Supreme Court, U.S.
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No. 03-15

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2002

STATE OF ARIZONA, Petitioner,

v.

DARREL PETER PANDELI, AKA DARREL PETER FLORIAN, Respondent.

Brief in Opposition to
Petition for a Writ of Certiorari to the
Supreme Court of Arizona

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Julie S. Hall
Az. Bar No. 017252
9387 N. Painted Sky Dr.
Tucson, AZ 85743
(520) 744-8994

Counsel of Record for Petitioner

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Pursuant to Rule 39, Rules of the Supreme Court, Respondent, Darrel Pandeli, hereby moves for leave to proceed *in forma pauperis* in the above-captioned action on the ground that he lacks sufficient funds to pay for fees and expenses.

Respondent is incarcerated under sentence of death in the Arizona State Prison in Florence, Arizona. Attached is Mr. Pandeli's declaration regarding his financial status. Mr. Pandeli was found indigent by the Arizona state courts. He has previously been found indigent by this Court. Pandeli v. Arizona, 536 U.S. 953, 122 S.Ct. 2654 (2002)(Mem). For these reasons, Respondent asks this Court grant this motion and allow him to proceed in forma pauperis.

Respectfully submitted this 2nd day of September, 2003.

Julie S. Hall

Julie S. Hall
Counsel of Record
9387 N. Painted Sky Dr.
Tucson, Arizona 85743

Attorney for Mr. Pandeli

DECLARATION

I, Darrel Peter Pandeli, swear under penalty of perjury that I am the Respondent in the above-entitled cause, that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking or savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this declaration will subject me to penalties for perjury.

Darrel Pandeli

Darrel Peter Pandeli

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that, if certiorari were granted, this case would present the following questions:

1. Whether this Court has jurisdiction to review the Arizona Supreme Court's state law based criminal procedure decision below.

2. Whether the Arizona Supreme Court violates federal law by choosing to order resentencings in capital cases in which constitutional error occurred at the sentencing phase, an alternative left open to the States by this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990).

3. Whether a complete denial of the right to jury trial on sentence enhancing factors, recognized by this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), is structural error that cannot be held harmless.

4. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), extends to eligibility factors that involve convictions for other criminal conduct.

5. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), applies to eligibility factors that involve a balancing and qualitative assessment of aggravating circumstances.

6. Whether judge only capital sentencing violates the Sixth, Eighth or Fourteenth Amendments.

7. Whether resentencing is still required where the unconstitutional finding

of one aggravating factor was not, and could not be, deemed harmless.

8. Whether the Eighth Amendment principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), permit state courts to disregard evidence of mitigating circumstances because they were arguably not shown, by a preponderance of the evidence, to have caused the crime.

9. Whether, consistent with the Sixth, Eighth, and Fourteenth Amendments, the Arizona Supreme Court could have reaffirmed petitioner's death sentence without allowing the merits of his individual case to be argued or presented in any fashion.

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JURISDICTION

Respondent agrees that this Court has jurisdiction over this certiorari petition, though not over some of the state law questions the petition seeks to raise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those set forth in the petition, this case involves the Tenth Amendment to the Constitution of the United States, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

This case also involves A.R.S. §§ 13-703 and 13-703.01, copies of which are set forth as Appendices A and B, respectively.

STATEMENT OF THE CASE

1. Arizona Capital Punishment Law After Ring v. Arizona

Immediately after this Court's *Ring* decision, the Arizona legislature was convened in special session to enact a new death sentencing statute. That statute was expressly made applicable to all cases in which direct appeal had not been finally resolved. 2002 ARIZ. SESS. LAWS, 5th S.S., Ch.1, § 7(A). The statute provided for a jury determination of all issues relating to guilt and sentence: defendant's guilt of first degree murder, the presence of aggravating circumstances, and the existence of sufficient mitigating circumstances to outweigh the aggravating circumstances. A.R.S. § 13-703.01.

Shortly thereafter, the Arizona Supreme Court consolidated all capital cases before it on direct appeal, including Mr. Pandeli's, for argument in *Ring*. In its decision in that case, the court determined that contrary to the defendants' arguments, violations

of *Ring*'s jury trial right could be held harmless. *State v. Ring*, 65 P.3d 915, 933-936 (Ariz. 2003)(*Ring III*). The court held that a sentence could be affirmed on the theory that the error was harmless, if and only if the court could conclude, that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt" and "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. This standard is substantially the same as Arizona's pre-*Ring* law regarding other forms of constitutional error in capital sentencing decisions by judges. *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)(refusing to affirm death sentence "[w]here there is a doubt whether the death sentence should be imposed"). However, it had another basis as well: the Arizona Supreme Court's determination that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *Ring III*, 65 P.3d at 943; *see also State v. Bible*, 858 P.2d 1152, 1212 (1993)(expressing strong preference for remand where there is error in a capital sentence because fairness and accuracy are promoted by single factfinder who can consider all evidence).

2. Respondent's Case.

A. Mr. Pandeli's Childhood

Darrel Pandeli was victimized sexually both by men and women throughout his entire childhood. He was first sexually abused when he was about five years old, by a male friend of the family who, having asked Mr. Pandeli's mother to marry him, became a father figure to Mr. Pandeli. Reporter's Transcript (herein after "RT") 5/14/98 at 88. Mr. Pandeli's older brother walked in on this assault and subsequently participated. Id. When he was around nine years old, Mr. Pandeli was also violently sodomized, both

orally and anally, after being attacked at knifepoint. Id. at 89, RT 6/5/98 at 46. Mr. Pandeli was also molested when he was a child by at least two different adult women. RT 4/30/98 at 65-8. A thirty year old female neighbor raped Mr. Pandeli, who was twelve at the time. RT 5/14/98 at 94. The family characterized this traumatic event as an "affair," and not as a molestation. Id. Mr. Pandeli was raped repeatedly when he was about fourteen or fifteen years old. RT 4/30/98 at 61, 141; RT 5/14/98 at 47. The perpetrator forced Mr. Pandeli to submit to sodomy by threatening him with a bat, a crowbar, or a knife. RT 5/14/98 at 93. Mr. Pandeli was raised in an environment of familial instability, which traumatized and confused him as to his sexuality and sexual identity. RT 4/30/98 at 56, RT 5/1/98 at 107. Mr. Pandeli's mother frequently switched sexual partners and preferences. RT 4/30/98 at 53; 5/5/98 at 8, 22, 25. When Mr. Pandeli was sixteen years old, he survived financially by selling his body on the streets. RT 4/30/98 at 103; RT 5/14/98 at 112. Because Mr. Pandeli was mentally deficient and had no place else to go, around the time of the crime he lived with a man with whom he traded housing and other assistance for sex. RT 5/14/98 at 46. Mr. Pandeli had been afraid all of his life, and when he was eventually arrested, jail was the safest place he had ever been. Id. at 73, 116.

Mr. Pandeli was parentless virtually his entire life. His alcoholic and physically abusive father abandoned the family when Mr. Pandeli was young, and his mother, who suffered from depression, was frequently absent and always unstable, making her unable to care for her children. Id. at 34, 51, 62-9, 76; RT 4/30/98 at 21. The one time Mr. Pandeli's father agreed to take care of Mr. Pandeli, when Mr. Pandeli was twelve years old, Mr. Pandeli's father threw him into a wall, which had a nail in it. RT 5/14/98 at 56. Their utter abdication of parental responsibility exacerbated Mr. Pandeli's mental

deficiencies, and left Mr. Pandeli vulnerable to the sexual victimization which he suffered at the hands of others throughout his childhood. Id. at 28, 52, 74.

Mr. Pandeli attempted suicide on at least six separate occasions, including when he was merely ten years old. Id. at 34, 40, 43, RT 6/5/98 at 13. From his early childhood, Mr. Pandeli has suffered from mental illness, serious neurological dysfunction, disordered thought processes, ADHD, and lack of perspective, yet his mother's own disorders prevented her from persisting in seeking medical care for him. RT 5/1/98 at 35, RT 5/14/98 at 30. He was given Benadryl and Ritalin between the ages of five and six for behavior modification, but received no other mental health treatment for his illnesses. RT 4/30/98 at 24; 5/5/98 at 44; 5/14/98 at 31-2. He was placed in classes especially reserved for the mentally ill and mentally disabled, due to his unsound mental health and persistent learning disabilities. RT 4/30/98 at 23, RT 5/5/98 at 38, RT 5/14/98 at 20. Despite his constant attendance at school until the 11th grade, Mr. Pandeli failed virtually every class he ever took. He could not read or write until he learned in jail after his arrest in this case. RT 4/30/98 at 141; RT 5/14/98 at 23, 47.

Several members of Mr. Pandeli's family also battle extraordinary mental health problems. RT 4/30/98 at 93, RT 5/14/98 at 36. Both his brother and mother have diagnosed mental illness, and suffered from severe depression, yet were unable to seek medical assistance. Mr. Pandeli's father, uncle and grandfather, like Mr. Pandeli, have significant histories of suicide attempts. RT 5/14/98 at 37-8.

Mr. Pandeli has a strong genetic tendency toward alcoholism, as his biological father, both grandfathers, and brother were all alcoholics. Id. at 36, 78. Mr. Pandeli was also seriously addicted to alcohol since the age of twelve. Id. at 81. For a period

of three years, Mr. Pandeli consumed approximately two cases of beer per week. Mr. Pandeli's struggle with substance addiction began at age six, when his ten-year old brother gave him drugs. Id. at 39; RT 4/30/98 at 38, 137. He found when he began to use drugs and get high he was not as afraid for his safety. RT 5/14/98 at 58. Among the drugs Mr. Pandeli used throughout the majority of his life for self-medication were marijuana, alcohol, cocaine, methamphetamine, crystal methamphetamine, LSD, PCP, uppers, downers, ecstasy, heroin, and barbiturates. RT 5/1/98 at 33, RT 5/14/98 at 7-9, 79. At the time of the crime, Mr. Pandeli was using large amounts of alcohol and drugs, which were extremely debilitating to his already-impaired cognitive functioning. RT 5/14/98 at 82-3.

B. The Crime

Holly Iler was a prostitute who, on the night of her death, had alcohol and cocaine in her blood, as well as fresh needle marks on her body. RT 6/30/97 at 90, 127-8. Ms. Iler was hitchhiking that night. Mr. Pandeli offered to give Ms. Iler a ride in his van, and she accepted. Mr. Pandeli picked her up because he wanted to have intercourse with her, not because he wanted to harm her. Mr. Pandeli, too, was severely impaired by drugs and alcohol, having used crystal methamphetamine and alcohol both prior to and during the time he and Ms. Iler were together. RT 5/14/98 at 83-4, 164; RT 6/5/98 at 22. Mr. Pandeli and Ms. Iler stopped at a park near his residence where she agreed to have sexual intercourse in exchange for twenty dollars. They both went into the back of the van and disrobed. He put on a condom and attempted intercourse. He was unable to perform sexually, and because of his paranoia and history of sexual abuse, perceived this as a threat and became frightened. RT 5/14/98 at 108, 110. Mr. Pandeli asked for his money back. Ms. Iler

became furious and pulled a knife on him. RT 6/5/98 at 63. Due to his fear of being raped at knifepoint, Mr. Pandeli became terrified and "lost it." Id. at 63. Ms. Iler was killed during the ensuing struggle, in the midst of which Mr. Pandeli hallucinated, believing that his girlfriend had entered Ms. Iler's body and became her. RT 5/1/98 at 29. There was no evidence of sexual trauma to Ms. Iler's body. Id. at 151. A used condom was found which contained no semen. Three days after Ms. Iler's death, Mr. Pandeli gave a statement to police implicating himself in the incident.

C. The Capital Trial and Sentencing

Mr. Pandeli was convicted of premeditated first-degree murder on July 2, 1997. After the jury finding of guilt, the trial judge alone conducted a separate factfinding hearing to determine the existence or non-existence of aggravating and mitigating circumstances, and whether Mr. Pandeli should live or die. See A.R.S. § 13-703(B)(1997).

i. The Mitigating Evidence

Psychiatrist Dr. Donald Stonefeld, M.D., diagnosed Mr. Pandeli as suffering from paranoid schizophrenia and post-traumatic stress disorder (PTSD) both prior to and at the time of Ms. Iler's death. RT 5/1/98 at 10, 42, 65. Psychological testing reflected Mr. Pandeli's serious psychopathology possibly indicative of psychotic symptoms and behavior. Id. at 15. Dr. Stonefeld found that Mr. Pandeli's mental illnesses interfered with his perceptions of reality. Id. at 51. Mr. Pandeli was prone to delusional thinking and hallucinations, and was likely to be autistic and have fragmented, tangential, and bizarre thought processes. Id. at 16. Mr. Pandeli hallucinated during Ms. Iler's death, believing that his girlfriend entered Ms. Iler's body and became her. Id. at 29. The drugs and alcohol Mr. Pandeli ingested the night of the crime not only exacerbated his

mental deficiency, but diminished his ability to control his behavior. Id. at 33, 65-6, 109. Mr. Pandeli's schizophrenia and loss of control resulted in Ms. Iler's death and the removal of her nipples after her death. Id. at 87, 102. Many factors caused his involuntary actions: fear of being raped, panic at being unable to perform sexually, and panic over his fear of being homosexual. RT 6/5/98 at 63; RT 5/1/98 at 41, 107; RT 5/14/98 at 106-110. The PTSD Mr. Pandeli suffered stemmed from the violent, repeated sexual abuse Mr. Pandeli suffered throughout his childhood.

Dr. Stonefeld testified that Mr. Pandeli's chaotic and violent childhood, including repeated sexual victimization and his mother's hyper-sexuality, caused pathological confusion as to his sexuality and identity. Psychological testing revealed that Mr. Pandeli did not suffer from antisocial personality disorder. RT 5/1/98 at 25. Dr. Stonefeld formed these conclusions after spending many hours over a course of three years gathering critical social history information from both Mr. Pandeli and Mr. Pandeli's mitigation specialist. Id. at 8.

Based upon the evidence, Dr. Stonefeld concluded beyond a reasonable medical certainty that Mr. Pandeli's paranoid schizophrenia, compounded by intoxication and substance abuse, would have substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the incident. Id. at 65-6, 72, 109. Mr. Pandeli's impaired perception of reality was apparent since his childhood. Id. at 72. The mitigation specialist additionally confirmed that Mr. Pandeli was impaired on the night of the crime from his extensive substance abuse coupled with his traumatic childhood. RT 5/14/98 at 164, 168.

The state's psychologist, Michael Bayless, Ph.D, testified that Mr. Pandeli likely suffered from antisocial personality disorder with symptomatology of related cluster disorder such as histrionic, narcissistic, or borderline personality disorder. RT 6/5/98 at 3. Dr. Bayless observed characteristics in Mr. Pandeli that were consistent with male child sexual abuse survivors or individuals with paranoid schizophrenia. Id. at 24, 69. Nonetheless, Dr. Bayless opined that Mr. Pandeli was able to appreciate the wrongfulness of his conduct at the time of the crime, based on evidence that Mr. Pandeli attempted to eliminate evidence after the crime and initially denied involvement in the offense when questioned by police three days later. RT 6/4/98 at 95. Dr. Bayless disagreed with Dr. Stonefeld's diagnosis of paranoid schizophrenia, asserting that paranoid schizophrenia is "fully incompatible with someone like Pandeli who maintains an active social life and exhibits his ability to interact and make eye contact with others." *State v. Pandeli*, 26 P.3d 1136, 1149 (2001)(*Pandeli I*); RT 6/4/98 at 76-8. Dr. Bayless additionally opposed the diagnosis of paranoid schizophrenia because Mr. Pandeli only reported experiencing hallucinations when he was using drugs. RT 6/5/98 at 19. Dr. Bayless also claimed that Mr. Pandeli did not suffer from PTSD because Mr. Pandeli did not seem continually anxious or stressed when questioned by police several days after the offense. RT 6/4/98 at 65. Dr. Bayless came to these conclusions after spending approximately two hours with Mr. Pandeli.

ii. The Aggravating Factors

The judge, acting alone without the input of the jury, found two aggravating circumstances: that Mr. Pandeli had previously been convicted of a serious offense, as set forth in A.R.S. § 13-703(F)(2), and that the offense was committed in an especially heinous and depraved manner, as set forth in A.R.S. § 13-703(F)(6). The judge based

the latter finding on the injuries to Ms. Iler's body and the removal of portions of Ms. Iler's breasts, which it characterized as gratuitous violence and mutilation. Special Verdict [hereinafter "SV"] at 2.

iii. The Judge's Sentencing Decision

The defense proved by a preponderance of the evidence a wealth of mitigating mental health and familial history evidence, including several instances of childhood sexual abuse; neglectful parents; personality disorders; a sexual history wrought with confusion, fear, and despair; lifetime addiction to drugs and alcohol; abuse of drugs and alcohol the night of the crime; learning disabilities; probable mental disabilities; and repeated suicide attempts. SV at 6. The judge, however, concluded none of this evidence, when considered separately and collectively, was linked to the crime, and therefore merited no weight. SV at 6-7. The judge discounted evidence of Mr. Pandeli's childhood abuse, saying there was no evidence of consistent, ongoing sexual abuse and that Mr. Pandeli's family life was not as bad as some other, unidentified, capital defendants. SV at 7. The judge refused to find Mr. Pandeli could be rehabilitated, claiming personality disorders made Mr. Pandeli predisposed to act in ways harmful to others, even while acknowledging that Mr. Pandeli had not presented any problems while incarcerated for much of the previous five years. SV at 8; RT 7/15/98 at 23.

The judge then made the unilateral decision to impose the death penalty, as Arizona's sentencing statute then authorized. SV at 9; see also A.R.S. § 13-703(E).

D. The Direct Appeal

Considering the information never heard by any juror, the Arizona Supreme Court upheld the trial court's finding of the two aggravating circumstances. The Court

also upheld the trial court's refusal to find a causal connection between Mr. Pandeli's social history and mental health evidence and his behavior at the time of the crime. *Pandeli I*, 26 P.3d at 1150. The Court based this decision on a credibility choice between the state and defense experts in testimony never presented to the jury.

E. Pandeli II

Following this Court's grant of Mr. Pandeli's petition for writ of certiorari, *Pandeli v. Arizona*, 536 U.S. 953 (2002)(Mem), the Arizona Supreme Court reconsidered his case in light of *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*). *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003)(*Pandeli II*). After finding exempt from *Ring II* the trial court's finding of the prior conviction aggravating factor, the Court commented that "the State can make a strong argument that no reasonable jury could fail to find the F.6 factor." *Pandeli II*, 65 P.3d at 953. It did not decide this question, however, because it concluded it was required to reverse the case regardless based on its consideration of mitigating evidence and the sentencing calculus.

The court could not "say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have assessed the defense expert's testimony as did the judge and would have failed to find mental impairment, a statutory mitigating circumstance." *Id* (citation omitted). Because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency,'" *Id* (citation omitted), as a matter of law, the court vacated the sentence of death and remanded for jury findings on each of those elements of the crime of capital murder. Petitioner now asks this Court to reverse that decision.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT'S DECISION BELOW RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT SAID WAS PERMISSIBLE IN *CLEMONS V. MISSISSIPPI*.

The state's real dispute is not with the Arizona Supreme Court's application of their holdings in *Ring III* to the decision in *Pandeli II*. The state actually seeks review of the holdings in *State v. Ring*, 65 P.3d 915 (Ariz. 2003)(*Ring III*). But the state did not seek either reconsideration of that decision in the Arizona Supreme Court, issued the same day as the decision attacked here, or certiorari review in this Court; instead electing to challenge that decision indirectly in Mr. Pandeli's case. Nevertheless, it is to *Ring III* that this Court must look to examine the basis for the outcome here. Doing so, it is apparent the state court acted well within its prerogative in both cases.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor which is exempt from *Ring II*, implicit in a jury's verdict, or supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that "the procedures urged by the State [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, 65 P.3d at 943. The court went on to describe the consistency of Arizona's statutory capital sentencing scheme that has always "assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. [It refused to] speculate about how the State's proposal would impact this essential process." *Id.* The court then cited to *Johnson v. Nevada*, 59 P.3d

450 (Nev. 2002), holding that *Ring II* as applied to Nevada law requires a jury to reweigh mitigating and aggravating factors. *Id.* The court held the same result obtained here.

The court later discussed the need to have a jury decide mitigating circumstances under Arizona law: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Id.* at 946. Citing Arizona's statute, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* In Respondent's case, the court specifically referred to the state law discussion in *Ring III*, also citing the Arizona statute at issue, A.R.S. § 13-703. *Pandeli II*, 65 P.3d at 953.

This result is permissible under this Court's jurisprudence and dictated by the nature of Arizona's capital sentencing scheme. Arizona is a weighing state. *See State v. Richmond*, 886 P.2d 1329 (1994). In *Clemons*, this Court held that, when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)(decision to reweigh or remand "is for state appellate courts. . .to make.")(footnote omitted). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring pure jury sentencing, it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*.

In fact, Respondent argued below that it is the only constitutionaliy permissible choice, as this sort of error is not properly subject to harmless error review. See Argument II.A. Although the Arizona Supreme Court held otherwise, its determination of the form that that harmless error review should take and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this Court in *Clemons*.

This Court does not sit to review such decisions of state law, state criminal procedure and state sentencing policy. *See* Sup.Ct. R. 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("if resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do."). This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It now should "give state judges a clear[ ] opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 7 (1995), quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even if this Court were to review the state law decision in this case, however, it would find that the Arizona Supreme Court's decision is a sensible one and is true to the legislative intent that was the Arizona Supreme Court's guide. Arizona has always viewed capital sentencing as something that involves qualitative as well as quantitative determinations. *State v. Van Adams*, 984 P.2d 16, 29 (Ariz. 1999)(noting that supporting evidence of cruelty "affects the strength of the cruelty factor, not its existence"), citing *State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996) (when conducting an independent review of the evidence, consideration is given to the "quality and the strength" of the aggravating and mitigating factors). The court has long recognized that Arizona's capital sentencing statute "does not require that the number of aggravating circumstances be weighed against the number of mitigating

circumstances." *State v. Mauro*, 766 P.2d 59, 81 (Ariz. 1988); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979)("One mitigating circumstance. . .may be 'sufficiently substantial' to outweigh two aggravating circumstances."). The court has explained:

> We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found.

State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982). For this reason, as the Arizona Supreme Court noted, the Arizona legislature has always felt it appropriate to put all decisions relating to capital sentencing–aggravation, mitigation, and penalty--in the hands of a single sentencer, who can bring the same qualitative judgment to the assessment of aggravation, mitigation and penalty. *Ring III*, 65 P.3d at 943.

This case shows why that approach makes sense. The mitigating evidence adduced in this case and found credible by the Arizona Supreme Court went both to the severity of both aggravating factors alleged, as well as the magnitude of the mitigation. The mitigating evidence and information regarding the defendant's mental state and history adduced below went both to the severity and weight to be given to the two aggravating circumstances as well as the mitigation to be weighed against them. Both aggravating facts were directly related to the defendant's background and disorders. The "heinousness" based on "mutilation" is directly attributable to the Respondent's mental illness, and background of victimization by severe sexual abuse. So is the "second" homicide, which occurred as a result of the same disabling forces. To view those aggravating facts in isolation and without the truer picture provided by the life history information would be to fail to fully assess their weight, as well as their identity and number, which Arizona requires. To artificially divide up the task of assessing

aggravation and mitigation in light of such background facts would increase the chance of error and arbitrariness in capital decision making. That no doubt is why the Arizona legislature felt it appropriate to put the sentencing decision in the hands of a single sentencer, under both statutory regimes. And that no doubt is why the Arizona Supreme Court decided to follow that state legislative dictate in this case and the others it reviewed after *Ring II*.

In any event, Arizona's decision to do that does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II*. *Ring II*, 536 U.S. at 609, n.7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue was controlled by Nevada law.[1]

Similarly, in *Woldt v. Martinez*, the Colorado Supreme Court held that Colorado's "three-judge panel capital sentencing statute. . .is unconstitutional on its face under *Ring*" but that defendants sentenced under that statute were entitled to resentencings "under Colorado law[.]" 64 P.3d 256, 262 (Colo. 2003). The court cited to Colorado law

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[1]The court held: "Nevada statutory law requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." *Johnson v. State*, 59 P.3d at 460 (italics in original)(footnote omitted).

interpreting the Colorado death penalty statute in determining which jury findings were eligibility findings. *Id*, at 264 (quoting *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

The legal landscape developing after *Ring II* may not be homogenous, but it is not in conflict. Each state has interpreted this Court's decision according to their state capital punishment laws and, as long as those decisions do not violate the requirements of *Ring II* and were left open to them in *Clemons*, that is all this Court requires.

The state complains that twenty-six capital cases will be affected by this decision. However, of the 31 cases on direct appeal when *Ring II* was announced, seven have been resolved on grounds other than *Ring II*, and in an additional three cases similar to Mr. Pandeli's, the time for filing cert has already run without a petition from the state. At this rate, only this and a handful of other cases would be affected were this court to accept, wholesale, Arizona's arguments in this petition. Even then, given historical error rates in Arizona, the sentences in most of those cases would be eventually reversed in later proceedings. *See* James S. Liebman, et. al., *A Broken System, Part II: Why there is so much error in capital cases, and what can be done about it* (visited Sept. 26, 2002), http://www.law.columbia.edu/brokensystem2>. Rather than delay capital proceedings in Arizona for yet another year, fairness and judicial economy favor allowing the jury resentencings that the Arizona courts have ordered under the new statutory procedures the Arizona legislature has prescribed, to begin.

II. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the grounds urged by Petitioner.

There are a number of such reasons which should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)(decision may be affirmed on grounds other than those stated by lower court).[2]

A. Denial of the Jury Trial Right Guaranteed by Ring is Structural Error That Should Not be Subject to Harmless Error Review.

This Court has held that unlike "an error in the trial process itself . . . structural defects in the constitution of the trial mechanism" can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been "altogether denied," because in such a case "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial process, but rather in the statutory structure governing capital sentencing – a classic "structural defect in the constitution of the trial mechanism" – that "altogether denied" capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the "wrong entity" – the judge – the job of determining the defendant's guilt as to those determinations. As the two *Ring III* dissenters recognized, harmless error review in cases like this "puts the [appellate court] in the position of speculating about one of the great unknowables-what a non-existent jury would have done." *Ring III*, 65 P.3d at 948 (Feldman, J., concurring in part and dissenting in part). Harmless error

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[2]Because Respondent is not seeking to change the judgment below, which properly ordered a full sentencing retrial, he has not filed a formal cross petition raising these issues, but would seek to have them considered in the event certiorari were granted. *See* ROBERT L. STERN, ET. AL, SUPREME COURT PRACTICE, at 363-364 (7th ed. 1993).

analysis cannot apply in such a case.

B. The Jury Trial Right Recognized in Ring Properly Applies to Aggravating Factors Involving Convictions for Other Criminal Conduct: Almandarez-Torres Should be Overruled.

As Justice Thomas' concurrence in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) shows, this Court's decision in *Almandarez-Torres v. United States*, 523 U.S. 224 (1998), suffered from the same constitutional error as *Walton v. Arizona*, 497 U.S. 639 (1990). Petitioner argues that the prior conviction aggravating circumstance found by the trial judge should have determined the outcome here because it exempts the case from the decision in *Ring II*. Thus, if certiorari were granted here, the case will necessarily present the threshold question of whether, in light of the history reviewed there and in Ring, this Court should overrule *Almendarez-Torres*.

The Arizona Supreme Court relied on *Almendarez-Torres* in finding the trial judge's determination of the prior conviction aggravating factor harmless. This is problematic for several reasons. First, it misapprehends the holding in *Almendarez-Torres*. As *Apprendi* noted, the defendant in *Almendarez-Torres* pleaded guilty, and in so doing, both waived his right to jury trial and admitted the previous felony convictions. Thus, the case before this Court only dealt with the sufficiency of the underlying indictment under the Fifth Amendment, and presented "no question concerning the right to a jury trial." *Apprendi*, 530 U.S. at 488. That question was presented in *Ring II*, where this Court held that "[c]apital defendants . . . are entitled to a jury determination of *any* fact on which the legislature conditions an increase in their maximum punishment." *Ring II*, 122 S. Ct. at 2432 (emphasis added). The fact of prior conviction squarely meets that description. *See also Apprendi*, 530 U.S. at 487, 489-90 (holding that even assuming arguendo that *Almenderez-Torres* was correctly decided, it is "at

best an exceptional departure" from the rule announced in *Jones* and *Apprendi*).

Moreover, Justice Thomas, voting with a five-member majority in *Almendarez-Torres*, repudiated his vote less than a year later, making clear that he now regards *Almendarez-Torres* as wrongly decided. *See Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). Thus, it is plain that a five-Justice majority of this Court no longer adheres to that decision.

Third, even if *Almendarez-Torres* remains applicable in the application of *Ring II* in some states, it's logic does not apply in Arizona. The statute at issue in *Almendarez-Torres* was a recidivist statute. This distinction compelled the result in that case because recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," 523 U.S. at 243 (citations omitted), and thus was not an element of the offense in question. Id, at 243-244. Arizona, conversely, elected in the capital context to make prior convictions not a penalty for recidivism, but an element of the crime of capital murder as much as any other aggravating factor listed in A.R.S. § 13-703(f). As that court has explained on numerous occasions:

> Our death penalty statute is not a recidivist or enhancement statute used to warn convicted criminals or encourage reform. . .. The purpose of the aggravation/mitigation hearing is to determine the character and propensities of the defendant. . .. That a defendant has been found guilty of another offense for which life is imposable is directly relevant to this determination. . ..

State v. Walden, 905 P.2d 974, 994-995 (1995)(citations omitted). Therefore, Arizona's death sentencing statute explicitly treats prior convictions as elements of the crime of capital murder, not as recidivist penalty enhancements, and thus does not fall within the narrow exception carved out in *Almendarez-Torres*, but falls squarely within the

mandate of *Ring II*. Thus, even if this Court were to grant the petition for writ of cert and reverse the opinion of the Arizona Supreme Court, Mr. Pandeli would still be entitled to re-sentencing under Arizona law.

C. The Jury Trial Right Recognized in Ring Properly Applies to the Aggravation/Mitigation Balance in States Which Make That Assessment an Eligibility Factor.

Although this Court did not reach the question in *Ring II*, the Arizona Supreme Court's analysis of the weighing question is also correct under federal law. The rule of *Ring II* is this: "[c]apital defendants. . .are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 588. Put in context, if a state conditions a sentence of death on the fact that mitigating factors do not outweigh aggravating factors, a jury determination is required. Arizona has done precisely that. The weighing finding in Arizona is not, and never has been, a stage at which the factfinder selects whether or not the defendant should receive death. In fact, until and unless the weighing factor is found, a defendant is categorically excluded from receiving the death penalty. *Ring II* requires that the jury verdict "reflect" the facts the jury found beyond a reasonable doubt "necessary to put . . [the capital defendant] to death." *Ring II*, 536 U.S. at 609. Because the weighing calculus is a necessary factor in an Arizona death sentence, it must be found by a jury beyond a reasonable doubt.

A consensus has developed among all but two death sentencing states that this factor must be determined by a jury, indicating almost total acceptance that the weighing fact is indeed an element of capital murder. This broad recognition in all relevant states that weighing is an element of the crime of capital murder adds force to Justice Breyer's concurring opinion in *Ring II*, and merits further review by this Court.

D. The Logic of Ring II, and Developments Since Ring II, Make it Apparent That Judge Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and Spaziano and Cabana Should be Overruled.

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates juries must make the ultimate sentencing decision. If this Court grants Arizona's request for cert review, this Court should also consider that evolving standards of decency require *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. MONT. CODE ANN. § 46-18-301; NEB. REV. STAT. § 29-2521. All but three of the 36 states make juries' determinations of sentence controlling.[3] This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)(discussing 18 states which prohibit execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, 458 U.S. 782, 789 (1982)(noting that only eight states permitted death sentences in cases where

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[3]Only in Florida, Alabama, and Delaware do judges retain sentencing authority after the jury's decision is reached. FLA. STAT. CH. § 921.141; ALA. CODE § 13A-5-47 (1975); DEL. CODE ANN. Tit. 11, § 4209. In Florida, the jury's sentence determination must be considered and given great weight. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Alabama requires the sentencing judge to consider the jury's recommendation of sentence before making its decision. ALA. CODE § 13A-5-47 (1975).

defendant participated in underlying felony but did not attempt or intend to kill). Given the nearly unanimous enactment of jury sentencing by state legislatures, Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by this case, if certiorari is granted here.

E. The Arizona Supreme Court Did Not, and Could Not, Find the Denial of a Jury Trial on Heinousness to Be Harmless.

The Court did not, as Petitioner contends, hold the finding of the especially cruel, heinous, and depraved aggravating circumstance harmless beyond a reasonable doubt. The Court commented that "the State can make a strong argument that no reasonable jury could fail to find the F.6 factor." *Pandeli II*, at 953. It did not need to decide this question, however, because the court could not "say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have. . .failed to find mental impairment, a statutory mitigating circumstance." *Id* (citation omitted). Because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency,'" *Id* (citation omitted), the court was required to remand for jury findings on each of those elements of the crime of capital murder. It therefore did not rule on the harmlessness of the especially cruel, heinous, or depraved aggravating factor.

The court could not have determined this finding by the trial judge, rather than a jury, was harmless. Mr. Pandeli's social history is tragically replete with the sexual abuse he suffered as a child. He was repeatedly traumatized by adult strangers, and even by those who had a responsibility to keep him safe. A reasonable juror could have found this compelling social history evidence rebutted the aggravating evidence

of mutilation and gratuitous violence. In Arizona, a finding of mutilation--and hence the finding of the especially cruel, heinous, and depraved aggravating factor in this case--requires a determination that the killer had in mind the purpose of mutilating the body of the deceased. *State v. Richmond (III)*, 886 P.2d 1329, 1336 (1993)(finding of mutilation requires some demonstration that the defendant acted with a "separate purpose to mutilate the corpse"), *quoting State v. Richmond (II)*, 666 P.2d 57, 68 (1983). A reasonable juror could have found that the damage to the victim's body was not a result of an intent to mutilate the corpse, but a tragic reaction to the trauma still haunting Mr. Pandeli. Similarly, a reasonable juror could have found the aggravating factor's gratuitous violence aspect unsupported by the thoughts and actions of this gravely damaged and impaired individual. As a result, even if the Arizona Supreme Court had adopted the state's interpretation of the statute regarding the balancing of aggravating and mitigating circumstances, the court would not have upheld Mr. Pandeli's death sentence.

The rule of *Ring II* does not require a jury determination of "one fact" or "the first fact" but "any fact." *Ring II*, 536 U.S. at 589. Thus, a finding that the prior conviction aggravating factor was exempt from *Ring II* did not end the inquiry because the court was still required to consider the second aggravating factor, which was also a fact which increased the range of Mr. Pandeli's punishment to death. Even if the Arizona Supreme Court improperly held Arizona law requires a remand for a jury determination regarding the relative weight of the aggravating and mitigating factors, remand was still necessary for the determination of this aggravating factor.

F. The Arizona Courts Violated *Lockett v. Ohio* and *Eddings v. Oklahoma* By Disregarding Mitigating Evidence Where It Is Not Shown To Cause The Defendant's Conduct At The Time Of The Crime.

1. Evidence of a Traumatic Family and Developmental History Is Relevant Mitigating Evidence.

This Court has repeatedly stressed the important and unquestionably mitigating nature of evidence that a capital defendant suffered from childhood abuse, even when the evidence is completely unrelated to the crime for which the defendant is sentenced. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]."); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"). This Court finds evidence of childhood abuse relevant and undeniably mitigating. And this Court does not restrict the consideration of mitigating factors to only those shown to have caused defendants' actions at the time of the crime. See *Williams (Terry) v. Taylor*, 120 S.C. 1495, 1512-1514 (2000)(reversing for defense counsel's failure to investigate and present evidence that documented childhood abuse). Evidence of childhood abuse must be considered as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114.

Obviously, extensive childhood abuse and neglect damages one's emotional health. "It defies reason and common experience to suggest that a youngster coming out of [a horrific environment] was largely unaffected and should be held accountable as any functioning adult." *State v. Hoskins*, 14 P.3d at 1031 (Zlaket, C.J., dissenting). As Chief Justice Rehnquist recognized, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority

to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745 (1982). Although medical science is not yet fully capable of quantifying and tracing the causal relationship between such abuse and criminal behavior, medical literature does reveal how childhood physical abuse may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications For The Death Penalty*, 77 N.C.L.REV 1143, 1185 (1999). Medical literature shows that sexual abuse is extraordinarily destructive to a child's psyche, especially for young males, in whom sexual abuse causes the most emotional and psychological distress, intense fear, anxiety, and stress. RT 5/14/98 at 86-7.

A sentencer must not be precluded from considering a capital defendant's proffered mitigating evidence of "any aspect of defendant's character, or record, and any of the circumstances of the offense" in all but the rarest of cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Evolving standards of decency and "the fundamental respect for humanity underlying the Eighth Amendment" require individualized sentencing "as a constitutionally indispensable part of inflicting the death penalty." *Eddings v. Oklahoma*, 455 U.S. at 114, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Evidence of childhood abuse is relevant in sentencing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable" than others. *Penry*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 497 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The sentencing body must have a vehicle for assessing the mitigating nature of the evidence that reflected on the defendant's personal culpability to determine what sentence is warranted. *Penry*, 492 U.S. at 322. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. Although courts "may determine the weight to be given relevant mitigating evidence[,]" they "may not give it no weight by excluding such evidence from their consideration." *Id.*, 455 U.S. at 115. Restricting consideration of mitigation creates a risk of an inappropriately severe sentence. *Lockett*, 438 U.S. at 605. Since "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Id.* at 604, states must be able to consider the mitigating evidence of childhood abuse without having to first find a causal connection between the abuse and the crime. Since it is mitigation, the sentencer should include it in the weighing process.

2. The Arizona Courts Flatly Refuse to Recognize This Court's Prior Holdings That a Traumatic Upbringing Is Mitigating Evidence.

Mr. Pandeli's horrific childhood and resulting emotional troubles were clearly established in a court of law by a preponderance of the evidence. The Arizona Supreme Court agreed that Mr. Pandeli was subject to repeated sodomy throughout his childhood, had a neglectful mother and absent father, attempted suicide several times, had learning disabilities and unsound mental health, was forced to sell his body on the streets, and had a sexual history wrought with violence and confusion. *Pandeli I*, 26 P.3d at 1147-1150. Although the Arizona Supreme Court found Mr. Pandeli's proffered evidence of his "family and developmental history" and "mental/emotional health" credible, it refused to consider this evidence as mitigation because there was no causal

connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Id.*, 26 P.3d at 1150-51.

Courts in other jurisdictions have faithfully followed this Court's precedent and determine that evidence of a traumatic upbringing is mitigating.[4] Arizona, however, regularly dismisses uncontroverted evidence of childhood abuse as irrelevant in the absence of proof that it somehow caused the crime. The Arizona Supreme Court has historically restricted its consideration of mitigation where a defendant proves that he suffered an abusive childhood. The Court repeatedly refuses to consider evidence of a dysfunctional family as mitigation without a causal connection to the defendant's ability to perceive, comprehend, or control his actions. See *State v. Sansing*, 26 P.23d 1118, 1131 (2001); *State v. Hoskins*, 14 P.3d 997, 1023 (2000); *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999); *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); *State v. McKinney*, 185 Ariz. 567, 587, 917 P.2d 1214, 1233 (1996); *State v. Laird*, 186 Ariz. 203, 920 P.2d 769 (1996); *State v. Murray (Robert)*, 184 Ariz. 9, 906 P.2d. 542 (1995); *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied*, 516 U.S. 878 (1995). Sentencing judges are prevented, as a matter of Arizona law, from considering proven evidence of a difficult upbringing unless a causal connection is established.

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[4]*See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State*, 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight), *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

> A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction ... can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts.

Hoskins, 14 P.3d at 1021. "The factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.* (emphasis added).

The Arizona statute challenged herein, A.R.S. § 13-703, was found over 10 years ago in *Walton v. Arizona* to be constitutional because Mr. Walton was "not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence," but instead was challenging the burden of proof by which mitigation should be considered. 497 U.S. 639, 649 (1990). This Court expressly stated that it "has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Id.* "A state may not preclude by statute, nor may a sentencer refuse to consider, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

Since *Walton*, however, the Arizona Supreme Court has repeatedly excluded an entire category of mitigating evidence offered by capital defendants: mitigating factors that could not be or were not proven to have caused the crime. Arizona courts are not *able* to consider a difficult childhood as mitigation, statutory or non-statutory, unless the causal connection is established; thus, entire types of mitigation are precluded in violation of the rule set forth in *Walton*.

This Court found such practice impermissible, where "the sentencing judge did not evaluate the evidence and find it wanting as a matter of fact; rather he found that as a matter of law he was unable to even consider the evidence." *Eddings*, 455 U.S. at

113. A categorical denial of credible evidence of a traumatic childhood because it did not cause the crime is tantamount to denying that evidence as a matter of law. There is a valid distinction between merely disbelieving evidence which a defendant offers and precluding consideration of that mitigating evidence altogether when it is proven. The latter approach, which Arizona takes, is unconstitutional.

After all mitigating evidence is allowed in for consideration, then federal law allows states to structure their consideration of mitigating factors. For example, if a state decided to give more weight to the mitigating factor of age than to the mitigating factor of good behavior in prison, it could do so. Here, there was no "vehicle," under Arizona law, for the sentencing court to "express[] its 'reasoned moral response'" to the mitigating evidence. See *Penry I*, 492 U.S. at 328, and *Eddings,* 455 U.S. 104. A sentencing scheme that precludes individualized sentencing "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind." 492 U.S. at 304. Thus, the causal connection requirement, which excludes relevant evidence and deems it irrelevant, is a direct violation of the Eighth Amendment protections carved out in *Lockett*, *Eddings,* and their progeny.

3. Even If a Causal Connection Were Constitutionally Permissible, Such Connection Was Demonstrated In This Case.

The unrelenting sexual abuse perpetrated upon Mr. Pandeli was but one of the constellation of traumas to which Mr. Pandeli was subjected all his life. Prior to the age of seven, Mr. Pandeli suffered assault, neglect, drug and alcohol addiction, serious learning disabilities, and an extraordinarily dysfunctional upbringing. RT 5/14/98 at 47-50. It is reasonable to assume that where an intoxicated, addicted, mentally ill, learning disabled, traumatized victim of childhood sexual abuse, who is prone to

hallucinations, perceives a threat from a sexual situation, his history will affect his actions. A causal connection is patently obvious from the facts: a boy who was repeatedly sodomized, forcibly raped at knifepoint, and molested by older women then turns into a mentally ill man who, in the midst of a sexual situation that induces a hallucinogenic panic, removes a portion of the victim's breasts from her body. Even though a qualified medical professional explicitly stated the obvious, that Mr. Pandeli's horrific childhood affected his capacity to control or comprehend his actions on the night of the crime, the Arizona Supreme Court refused to find a causal connection. As shown from Mr. Pandeli's case, Arizona's requirement that such a relationship be proved thus effectively prevents the sentencer from considering such evidence at all in most cases. If Certiorari should be granted here, Arizona's gross and systemic disregard of the teachings of *Lockett* and *Eddings* should be corrected.

G. Respondent Was Denied His Right to Counsel When the Arizona Supreme Court Consolidated His Case with 30 Others and Appointed One Lawyer to Brief and Argue for All Defendants.

Following this Court's remand of Respondent's case to the Arizona Supreme Court for consideration in light of *Ring II*, the Arizona Supreme Court consolidated Respondent's case with those of thirty other capital defendants then pending direct appeal. The Court further ordered that one "lead counsel" would be responsible for all briefing and argument before that Court. Although Respondent objected repeatedly to this process, he was forced to accept representation by one lawyer, counsel for Timothy Ring. As a result, Respondent was not able to present all of the arguments entitling him to relief. By compelling him to accept conflicted counsel and forcing him to rely on the truncated and over-generalized arguments that resulted, Respondent was deprived of effective representation under the Sixth Amendment.

Arizona requires that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Ariz. R. Sup.Ct. 81, Canon 3.B(7). The ethical requirement that a court must allow a defendant the right to be heard was more compelling here, for the requirement fulfills the constitutional mandate for the enactment of capital sentencing statutes by the states. To pass constitutional muster, a capital sentencing scheme must allow for an individualized determination of death-worthiness that includes a full consideration of any mitigating circumstances, and that weighs the appropriateness of the death sentence for the person and the crime.

> For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."

Penry v. Johnson, 532 U.S. 782, 797 (2001)(internal citations omitted).

By adopting the consolidation strategy, the vast majority of the thirty-one defendants were not heard. Not only were the procedural postures of the defendant's cases varied,[5] but at least seven different aggravators were at issue, in some cases singly and in others in combination. By allowing the filing of only one brief, and the argument of only one lawyer – and that a lawyer totally unfamiliar and incapable of becoming familiar with the specific facts and legal issues pertinent to most of the appellants' crucial arguments – it was impossible for the court to be adequately informed on the issues before it. This precluded an application of law to the facts of an individual's case.

[5] The procedural postures of the consolidated case ranged from appellants who had not even filed their appellate briefs to appellants whose appeals had been decided, and remanded by this Court after certiorari review.

The reality of the consolidation orders was this: regardless of which counsel attempted the impossible task of effectively drafting and filing the brief, no counsel could be selected who represented a client on every issue involved. Thus, of necessity, on numerous issues, clients did not receive the critical ingredient of undivided loyalty and diligent and zealous advocacy to which each was entitled. Yet, given that this was the only brief the court considered on behalf of Respondent on these life and death issues, his counsel had no alternative but to include Respondent on the brief despite serious concerns about arguments and facts included in, and omitted from, the brief.

The conflict was magnified at oral argument. The court allowed one forty-five minute argument by one counsel on the varying issues, only a few of which affected all Appellants and most of which affected only some, but not other, Appellants. Although any oral argument requires counsel to choose what issues on which to focus, this case presented additional, insurmountable obstacles to the counsel who attempted to represent all of the Appellants, including those whose best interests diverged from arguing counsel's client.[6] Arguing counsel had an obligation to select issues to argue that would not harm his client or any other appellant in the consolidated group. Of course, that could not be done. Even if it could, counsel would necessarily have violated his duty of loyalty and zealous representation to the individual client to represent only the client's interests, and not serve two, much less thirty, other masters

[6]For example, arguing counsel's client, Timothy Ring, was convicted of one, and only one, aggravating factor: pecuniary gain. Respondent was convicted of two aggravating factors: prior conviction and especially cruel, heinous, and depraved. Mr. Ring's case, then, did not even present several issues critical to Respondent: 1) whether prior conviction aggravating factors are exempt from *Ring II*; 2) whether a finding of one aggravating factor which arguably does not violate *Ring II* ends a court's inquiry; and 3) whether the especially cruel, heinous, and depraved finding by a judge can ever be harmless.

with varying and conflicting interests. See *Glasser v. United States*, 315 U.S. 60, 75 (1942). In the final analysis, the consolidation procedure allowed no Appellant to receive what the constitution requires: an effective counsel who "play[s] the role of an active advocate, rather than a mere friend of the court," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), and who observes a duty of "zealous and loyal representation," *Nix v. Whiteside*, 475 U.S. 157, 188 (1986). And the most insidious element of the harm is that it is most apparent in what is not apparent at all, hidden from view by the sin of omission. As this Court explained in *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978): "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), this Court explained that a fair trial depended upon adversarial testing, and that adversarial testing in turn depended upon effective counsel:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id. This Court also defined what counsel was expected to bring to the court on behalf of his client:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

> Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. at 688. Here, by asking one lawyer to write and speak on behalf of all thirty-one, the court promoted precisely the opposite: conflicted counsel who was put into a position where he could not advocate any single appellant's cause, and was placed under restrictions of time and space so that he could not utilize his skill and knowledge on behalf of each appellant. Unable to advance arguments that reflected effective counsel to each appellant, his representation of all was *per se* ineffective.

These concerns are no less vital on appeal. *Penson v. Ohio*, 488 U.S. 75, 86-88 (1988). It is the responsibility of the appellate court to ensure that counsel's representation "be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States*, 315 U.S. at 70. *See also, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Kennedy, J., dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests."). The conflict and its consequences were presented repeatedly to the court, which in turn ignored the conflict, presumptively undermining the adversarial process. *Mickens v. Taylor*, 122 S.Ct. 1237, 1241-1242 (2002)(*quoting Holloway*, 435 U.S. at 488, 490 (1978) ("The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively seal his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors."); *see also Glasser*, 315 U.S. at 71

("instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.) A cert grant which might result in a remand to the Arizona Supreme Court should address this issue of whether Respondent was denied his right to counsel on appeal due to the conflict.

CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, and because the disposition of the case this petition challenges is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the petition for certiorari should be denied. If the petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

Respectfully submitted,

Julie S. Hall

Julie S. Hall

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2003, one copy of the attached document was deposited in the United States mailbox, first-class postage prepaid, and addressed to counsel for the State of Arizona, Mr. Kent Cattani, Office of the Attorney General, 1275 West Washington, Phoenix, AZ 85007. I further certify that all parties required to be served have been served.

Julie S. Hall

Julie S. Hall
Arizona Bar No. 017252
9387 N. Painted Sky Dr.
Tucson, AZ 85743
(520) 744-8994

Counsel of Record for Petitioner

APPENDIX A

A.R.S. § 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13-703.01. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age.

B. At the aggravation phase of the sentencing proceeding that is held pursuant to § 13-703.01, the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials. The burden of establishing the existence of any of the aggravating circumstances set forth in subsection F of this section is on the prosecution. The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.

C. At the penalty phase of the sentencing proceeding that is held pursuant to § 13-703.01, the prosecution or the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.

D. Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt. The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.

E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. The trier of fact shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, that were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

G. The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.

H. For the purposes of this section,
"serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:
1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

APPENDIX B

AZ ST § 13-703.01
A.R.S. § 13-703.01

ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

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Current through End of the Forty-Fifth Legislature,
Second Regular and Fifth Special Sessions (2002)

§ 13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death. If the state has not filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under § **13-703,** subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under § **13-703,** subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to

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impose a sentence of life or natural life.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, iF the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.

N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

P. The trier of fact shall make all factual determinations required by this section or the constitution of the United States or this state to impose a death sentence.

Q. Subject to the provisions of § 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

R. For the purposes of this section:

1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

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APPENDIX C

26 P.3d 1136
(Cite as: 200 Ariz. 365, 26 P.3d 1136)

Supreme Court of Arizona.

STATE of Arizona, Appellee,
v.
Darrel Peter **PANDELI**, aka Darrel Peter Florian, Appellant.

No. CR 98-0376-AP.

July 17, 2001.

Defendant was convicted in Superior Court, Maricopa County, No. CR-98-0376- AP, Gregory H. Martin, J., of first degree murder, and sentenced to death. Defendant appealed. The Supreme Court, Jones, Vice C.J., held that: (1) defendant was not entitled to offer his confession as a statement against interest without taking the stand to testify; (2) trial court was warranted in omitting instruction on manslaughter; (3) victim's murder was committed in an especially heinous, cruel or depraved manner; (4) defendant failed to establish that he was incapable of appreciating wrongfulness of his conduct, or that he could not conform his conduct to requirements of law; and (5) mitigating factors failed to provide sufficient reason to call for leniency.

Affirmed.

West Headnotes

[1] **Criminal Law** ⇐**1153(1)**
110k1153(1) Most Cited Cases

Supreme Court reviews a trial judge's refusal to admit defendant's confession for abuse of discretion; decisions to exclude such evidence remain within the sound discretion of the trial court and will be reversed on appeal only upon a showing of clear, prejudicial abuse, such that the prejudice was sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed.

[2] **Criminal Law** ⇐**417(15)**
110k417(15) Most Cited Cases

To admit statement against declarant's interest offered to exculpate accused, (1) the declarant must be unavailable, (2) the statement must be against the declarant's interest, and (3) there must be corroborating evidence that indicates the statement's trustworthiness; all three requirements must be satisfied. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[3] **Criminal Law** ⇐**417(15)**
110k417(15) Most Cited Cases

If a non-defendant declarant asserts the Fifth Amendment privilege against self-incrimination, he is deemed unavailable as a witness for purposes of statement against interest exception to hearsay rule. U.S.C.A. Const.Amend. 5.

[4] **Criminal Law** ⇐**517(7)**
110k517(7) Most Cited Cases

Murder defendant was not entitled to offer his confession as a statement against interest without taking the stand to testify; defendant was not "unavailable" as contemplated by rule governing evidence of statement against interest, since

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defendant had ability to compel himself to testify, but chose, instead, to avoid cross-examination by asserting Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5; 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[5] **Criminal Law** ⇐**517(7)**
110k517(7) Most Cited Cases

When a defendant proffers his own confession for exculpatory purposes, the statement constitutes inadmissible hearsay not in compliance with Rule governing admission of statements against interest. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[6] **Criminal Law** ⇐**419(2.20)**
110k419(2.20) Most Cited Cases

Murder defendant's statement that he felt angered and threatened by the victim failed to qualify as present state of mind evidence as exception to hearsay rule, given that the statement was given to police two days after the murder, and it described nothing more than asserted memory of past events, rather than present feeling or future intent. 17A A.R.S. Rules of Evid., Rule 803(3).

[7] **Criminal Law** ⇐**1173.3**
110k1173.3 Most Cited Cases
(Formerly 203k341)

By convicting defendant of first-degree murder and ignoring lesser-included offenses of second-degree murder, jury necessarily rejected all lesser-included crimes, and thus, trial court was warranted in omitting instruction on manslaughter, and any error was harmless.

[8] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

Independent review by the Supreme Court of aggravation and mitigation findings of the trial court ensures that a death penalty is not imposed arbitrarily, is reserved for exceptional cases which satisfy statutory aggravation standards, and is the appropriate sanction for the crime in question.

[9] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

The Supreme Court will review the record in a capital murder case to determine the presence or absence of aggravating and mitigating circumstances, as well as the weight to be accorded each circumstance.

[10] **Sentencing and Punishment** ⇐**1771**
350Hk1771 Most Cited Cases

Aggravating circumstances must be proven beyond a reasonable doubt in order to support imposition of the death sentence, although both statutory and non- statutory mitigating circumstances may be proven by a preponderance of the evidence.

[11] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

When mitigation evidence on independent review by the Supreme Court of a death sentence is conflicting and entails considerations of credibility, the Court will accord deference to the trial court's conclusions, but will be independently responsible for weighing all factors to determine ultimately whether proven mitigating circumstances, measured separately or cumulatively, are sufficient to outweigh aggravating circumstances established on the record.

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[12] **Sentencing and Punishment** ⚿1756
350Hk1756 Most Cited Cases

[12] **Sentencing and Punishment** ⚿1757
350Hk1757 Most Cited Cases

Rules of evidence governing admissibility differ as between aggravating and mitigating circumstances in determination of whether death sentence will be imposed; information relevant to any mitigating circumstances may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, however, the admissibility of information relevant to any aggravating circumstance shall be governed by the rules of evidence. A.R.S. § 13-703, subd. C (2000).

[13] **Sentencing and Punishment** ⚿1652
350Hk1652 Most Cited Cases

A court cannot impose death penalty unless it finds that the State has proved at least one aggravating factor. A.R.S. § 13-703, subd. F (2000).

[14] **Sentencing and Punishment** ⚿1705
350Hk1705 Most Cited Cases

[14] **Sentencing and Punishment** ⚿1771
350Hk1771 Most Cited Cases

Aggravating circumstance consisting of a previous conviction of a serious offense was established beyond a reasonable doubt at defendant's sentencing hearing for first-degree murder, where state presented unchallenged, second- degree murder conviction of defendant. A.R.S. § 13-703, subd. F, par. 2 (2000).

[15] **Sentencing and Punishment** ⚿1633
350Hk1633 Most Cited Cases

Date of the crime for which a death sentence was given is the date used to evaluate whether the new version of statute governing aggravating circumstance of previous conviction of a serious offense applies. A.R.S. § 13-703, subd. F, par. 2 (2000).

[16] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

To find that a murder fits within statutory aggravating circumstance as especially heinous, cruel or depraved, so as to warrant death senterce, the State must prove that the crime was committed in a manner that places it above the norm for first degree murder, and because the statute is worded in the disjunctive, any one of three elements--heinousness, cruelty, or depravity--is independently sufficient. A.R.S. § 13-703, subd. F, par. 6 (2000).

[17] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

For purposes of applying statute governing aggravating circumstance for murder committed in an especially heinous, cruel or depraved manner, so as to warrant death sentence, unlike cruelty, which focuses on a victim's mental suffering and physical pain, heinousness and depravity pertain to the killer's state of mind during and immediately following the murder, as evidenced by his words or conduct. A.R.S. § 13-703, subd. F, par. 6 (2000).

[18] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

Maiming a victim beyond the point necessary to fulfill a defendant's criminal purpose, or beyond the point necessary

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to kill, constitutes gratuitous violence so as to establish heinousness and depravity aggravating circumstance warranting death penalty.

[19] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

Evidence that defendant attempted to strangulate victim, and that he struck her with enough blows to fracture her sternum, far exceeded that necessary to show that defendant merely intended to retrieve money paid to victim or to take her life, which was accomplished with a single knife slash to the throat, thus, showing that defendant acted with gratuitous violence, and supporting finding of heinousness and depravity as aggravating circumstance warranting death penalty. A.R.S. § 13-703, subd. F, par. 6 (2000).

[20] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

"Mutilation" as an element of heinousness and depravity is an act distinct from the killing itself that includes the purposeful severing of body parts. A.R.S. § 13-703, subd. F, par. 6 (2000).

[21] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

A finding of mutilation requires some demonstration that the defendant acted with a separate purpose to mutilate the corpse.

[22] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

Evidence that defendant excised parts of both breasts after the death due to anger was sufficient to show that defendant mutilated the victim, so as to support finding of heinousness and depravity as aggravating circumstance warranting death penalty. A.R.S. § 13-703, subd. F, par. 6 (2000).

[23] **Sentencing and Punishment** ⇐1788(5)
350Hk1788(5) Most Cited Cases

On review of a death sentence, the Supreme Court will assess both statutory and non-statutory mitigating factors; the former includes significant mental impairment, while the latter, includes any facet of defendant's character, propensities or record, and any other circumstances of the offense.

[24] **Sentencing and Punishment** ⇐1757
350Hk1757 Most Cited Cases

The purpose of mitigation evidence is to permit the court to determine whether a sentence less severe than death is appropriate; if evidence of mitigation fails to meet the relevant statutory standard, the court must then consider whether it may constitute non-statutory mitigation.

[25] **Sentencing and Punishment** ⇐1658
350Hk1658 Most Cited Cases

[25] **Sentencing and Punishment** ⇐1757
350Hk1757 Most Cited Cases

Although the court in capital murder case must consider all relevant evidence offered in mitigation at sentencing, not all proffered evidence must be found by the court to be mitigating, and even if mitigating, such evidence may deserve no more than slight or nominal weight.

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[26] **Sentencing and Punishment** ⚿1661
350Hk1661 Most Cited Cases

[26] **Sentencing and Punishment** ⚿1771
350Hk1771 Most Cited Cases

The existence of mitigating circumstances is subject to a preponderance of the evidence standard; the court has discretion to determine how much weight, if any, to give each factor.

[27] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

To qualify for a finding of significant impairment to establish statutory mitigating circumstance at sentencing in a capital murder case, a defendant must demonstrate that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired; proof of incapacity as to either component will establish mitigation.

[28] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

A diagnosed mental illness may establish a mitigating sentencing factor of incapacity to appreciate wrongfulness of conduct, or to conform his conduct to the requirements of law, in capital case. A.R.S. § 13-703, subd. G, par. 1 (2000).

[29] **Sentencing and Punishment** ⚿1772
350Hk1772 Most Cited Cases

In determining the existence of significant impairment mitigation in capital murder case, the trial judge has broad discretion in evaluating the weight and credibility of expert mental health evidence. A.R.S. § 13-703, subd. G, par. 1 (2000).

[30] **Sentencing and Punishment** ⚿1789(8)
350Hk1789(8) Most Cited Cases

When mitigation evidence in capital murder case conflicts and entails considerations of credibility, Supreme Court will give substantial deference to the trial court's determinations. A.R.S. § 13-703, subd. G, par. 1 (2000).

[31] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

Capital murder defendant failed to establish at sentencing that he was incapable of appreciating wrongfulness of his conduct, or that he could not conform his conduct to requirements of law, so as to establish statutory mitigating circumstance of a significant impairment; although defendant's mental health expert concluded that defendant suffered from paranoid schizophrenia and post traumatic stress disorder (PTSD), state's psychological expert rejected those diagnoses, in part, because defendant maintained an active social life and exhibited ability to interact with others and, at most, exhibited traits of a person with an antisocial personality disorder, while defendant's initial denial of his involvement in the crime and attempt to eliminate evidence showed his understanding of the wrongfulness of his actions. A.R.S. § 13-703, subd. G, par. 1 (2000).

[32] **Sentencing and Punishment** ⚿1788(5)
350Hk1788(5) Most Cited Cases

Even if a psychological disorder does not rise to the level of mental disease or defect originally contemplated as a statutory mitigating circumstance in capital murder case, the Supreme Court will continue to assess the evidence to determine whether non-statutory mitigation may be sufficient to warrant a reduction in sentence, and will also determine whether the required causal nexus exists between any mental or personality disorder and the defendant's

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criminal acts.

[33] **Sentencing and Punishment** ⊂⊃**1788(5)**
350Hk1788(5) Most Cited Cases

Supreme Court's primary task when assessing evidence of mental disorder in capital murder case is to determine its mitigating weight.

[34] **Sentencing and Punishment** ⊂⊃**1709**
350Hk1709 Most Cited Cases

A nexus is established by evidence, testimonial or otherwise, connecting defendant's mental or personality disorder with his capital crime.

[35] **Sentencing and Punishment** ⊂⊃**1709**
350Hk1709 Most Cited Cases

Evidence, though conflicting, was insufficient to find a nexus between defendant's personality disorder, as a non-statutory mitigating circumstance, and crime of capital murder, where state's psychological expert rejected defendant's expert's diagnosis and opinion of causal link, stating unequivocally that the defendant was neither experiencing paranoid delusions, nor was schizophrenia or any other mental disorder a factor which caused the crime to occur, but rather, defendant was in control of his actions and fully understood what he was doing.

[36] **Sentencing and Punishment** ⊂⊃**1685**
350Hk1685 Most Cited Cases

When a jury verdict finding defendant guilty beyond a reasonable doubt is supported by very strong evidence, trial court may refuse to find the nonstatutory mitigating circumstance of residual doubt, even where the verdict is grounded in circumstantial evidence.

[37] **Sentencing and Punishment** ⊂⊃**1685**
350Hk1685 Most Cited Cases

No evidentiary basis existed for finding nonstatutory mitigating circumstance of residual doubt in capital murder case, where victim was beaten and strangled before the killing, affording defendant an opportunity to consider what he was doing, and no forensic evidence reflected a struggle between victim and defendant, as defendant had claimed.

[38] **Sentencing and Punishment** ⊂⊃**1718**
350Hk1718 Most Cited Cases

Potential for rehabilitation during a life sentence may constitute a mitigating circumstance in a capital murder case.

[39] **Sentencing and Punishment** ⊂⊃**1718**
350Hk1718 Most Cited Cases

Defendant's potential for permanent rehabilitation, even if mitigating, could be accorded only the slightest weight, given that defendant's incarceration had been spent in administrative segregation where he has had fewer opportunities to interact with others.

[40] **Sentencing and Punishment** ⊂⊃**1721**
350Hk1721 Most Cited Cases

Evidence at sentencing hearing that capital murder defendant had been a model prisoner and had not been involved in difficulties or altercations while in prison and had adjusted to his incarceration was of minimal weight as a nonstatutory mitigating circumstance.

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[41] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Good conduct during pretrial and presentence incarceration may be, but is not always, mitigating at sentencing in capital murder case.

[42] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Uncontradicted evidence at the sentencing hearing establishing that capital murder defendant taught himself to read and write while incarcerated was entitled only to minimal mitigation.

[43] **Sentencing and Punishment** ⚿1715
350HK1715 Most Cited Cases

Evidence offered by capital murder defendant that defendant had contracted hepatitis C, which would shorten his life did not qualify as a nonstatutory mitigating circumstance.

[44] **Sentencing and Punishment** ⚿1704
350HK1704 Most Cited Cases

Fact that prior murder committed by defendant occurred more than a year earlier was not entitled to any weight in mitigation at sentencing for capital murder.

[45] **Sentencing and Punishment** ⚿1719
350HK1719 Most Cited Cases

Capital murder defendant's cooperation with the police through forensic testing did not qualify as a nonstatutory mitigating circumstance, where such cooperation occurred only when defendant believed his guilt was discoverable, after he had already sought to hide or destroy evidence, evade detection, and had denied knowledge of the crime.

[46] **Sentencing and Punishment** ⚿1719
350HK1719 Most Cited Cases

Admission of guilt and cooperation with the police in a capital murder case can be a mitigating circumstance at sentencing.

[47] **Sentencing and Punishment** ⚿1718
350HK1718 Most Cited Cases

Remorse over the killings of defendant's two victims was established as a mitigator, where defendant expressed regret over the pain brought upon victim's families, and defendant's remorse appeared genuine and mitigating.

[48] **Sentencing and Punishment** ⚿1718
350HK1718 Most Cited Cases

Genuine remorse may constitute non-statutory mitigation at sentencing for committing a capital crime.

[49] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Capital murder defendant's religious faith, found after conviction and incarceration, was entitled only to slight mitigating weight.

[50] **Sentencing and Punishment** ⚿1721

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350Hk1721 Most Cited Cases

New-found religious faith may be considered non-statutory mitigation.

[51] **Sentencing and Punishment** ⚿1702
350Hk1702 Most Cited Cases

Capital murder defendant was not entitled to have evidence of general good character considered as a nonstatutory mitigating circumstance, though prior to the two murders, defendant had no trouble with the law, given that the two murders were committed just over one year apart.

[52] **Sentencing and Punishment** ⚿1702
350Hk1702 Most Cited Cases

[52] **Sentencing and Punishment** ⚿1704
350Hk1704 Most Cited Cases

Evidence of no prior crimes, as well as evidence of general good character may be mitigating circumstance in capital murder case.

[53] **Sentencing and Punishment** ⚿58
350Hk58 Most Cited Cases

Aggravating and mitigating circumstances are evaluated both separately and cumulatively by the sentencing court; when at least one aggravator is found and one or more mitigators is established, the Supreme Court must decide whether the mitigation is sufficiently substantial to call for a reduction in sentence.

[54] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

[54] **Sentencing and Punishment** ⚿1700
350Hk1700 Most Cited Cases

Mitigating factors, viewed separately or cumulatively, such as capital murder defendant's potential for rehabilitation, adaption to incarceration, remorse, and religious faith, failed to provide sufficient reason to call for leniency in light of his prior murder of another victim, as well as the especially heinous, cruel or depraved nature of the most recent murder, where defendant attempted to strangle victim, and struck her with enough blows to fracture her sternum, before killing her with a knife, and subsequently mutilating her body. A.R.S. § 13-703, subd. F, pars. 2, 6 (2000).

****1141*370** Janet Napolitano, Attorney General, by Paul J. McMurdie, Criminal Appeals Chief Counsel and Kent E. Cattani, Assistant Attorney General, Phoenix, Attorneys for Appellee.

J. Douglas McVay, Phoenix, Attorney for Appellant.

OPINION

JONES, Vice Chief Justice.

¶ 1 Defendant Darrel Peter Pandeli (defendant) was convicted by a jury of first degree murder and was sentenced to death by the trial judge. The case is before us on direct review, pursuant to Rules 26.15 and 31.2 of the Arizona Rules of Criminal Procedure. We have jurisdiction pursuant to article VI, § 5(3) of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 13-4031 (1989) and 13-703.01 (Supp.1999).

PROCEDURAL HISTORY

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¶ 2 The State charged defendant with two counts of premeditated murder: count one for the murder of Teresa Humphreys and count two for the murder of Holly Iler. Humphreys was murdered more than a year before Iler. The two counts were severed for trial.

¶ 3 In February 1996, a jury convicted defendant of second degree murder for the Humphreys death. The trial court sentenced him to twenty years in prison. Defendant appealed the conviction, and the court of appeals affirmed. This appeal pertains exclusively to the conviction and sentence in the Iler case.

¶ 4 Defendant's trial for the Iler murder commenced in June 1997. At the close of the State's case, defense counsel moved for a directed verdict on premeditated murder, arguing that no evidence of premeditation existed and asking the trial court to allow the jury to consider only second degree murder and its lesser-included offenses. The trial court denied the motion. Defendant did not testify, and defense counsel presented no evidence because defendant did not contest the allegation that he killed Iler. He challenged only the element of premeditation in connection with the murder charge.

¶ 5 The jury, instructed on both first and second degree murder, returned its verdict July 2, 1997, convicting defendant of first degree murder. The sentencing hearing lasted eight days. The trial court heard testimony and argument on all sentencing issues and, on July 15, 1998, handed down its Special Verdict sentencing defendant to death.

FACTS

¶ 6 On September 23, 1993, defendant and his friend, Mark Cowan, went to a bar in Phoenix where they consumed beer. After the bar trip, the two proceeded to a K Mart store where Cowan purchased a shirt. Cowan changed his clothes and left his shirt, shoes, and deodorant in the defendant's van. They then met defendant's brother Chris Pandeli and another friend at a restaurant at the Arizona Center in Phoenix and remained there for several hours. At about 10:15 p.m., Chris and Cowan left for another bar. Defendant stayed at the Arizona Center. At approximately 11:45 p.m., defendant again met Chris and Cowan and asked his brother to give Cowan a ride home. Cowan slept at Chris' apartment that night.

¶ 7 At about 2:00 a.m., defendant's roommate, Louis Russo, arrived home and found defendant cleaning his van and washing his clothing. Defendant had removed the mattress from his van. Russo testified that defendant told him he was cleaning the van because someone spilled a strawberry soda inside and that defendant appeared sober but upset, excited, and stressed.

¶ 8 The next morning, Holly Iler's nude body was found in an alley near the defendant's residence. Among other injuries, her throat had been slashed and the areolae and nipple parts of her breasts excised.

**1142 *371 ¶ 9 The same morning, Cowan asked Chris to take him to defendant's house to retrieve his clothing from the van. They arrived at about 7:30 a.m. and found the defendant outside. Still tired, Cowan asked defendant if he could sleep in the van, and defendant permitted him to do so. After approximately ninety minutes, defendant woke Cowan and told him the police were investigating the death of a woman whose body was found down the street. Cowan drifted back to sleep, but defendant woke him again and asked whether Cowan knew what an RV van marked "Phoenix Mobile Command" would be doing at a crime scene. Cowan told defendant he presumed it was a mobile crime laboratory. Defendant then asked Cowan if the police had the ability to detect tire tracks or identify other types of tracks, and Cowan responded that the police could take impressions and pictures of tracks.

¶ 10 Shortly thereafter, defendant and Cowan left to run errands. When defendant dropped Cowan off at a motel, he gave Cowan his clothing from the van, but the shirt and one sock were missing. After showering at the motel, Cowan noticed red spots on his shoes and deodorant stick that were not present when he left them in defendant's van the night before. Cowan became suspicious that defendant was somehow involved in the death of the woman whose body had been discovered and watched for television reports of the crime. When he saw a report describing the victim, his suspicion heightened because the description resembled a woman with whom defendant had socialized the night before at the Arizona Center. Though it was not the same woman, Cowan thought it might be.

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¶ 11 That evening, the defendant, Cowan, Chris, and two other friends went to several bars. During the evening, Cowan noticed that defendant appeared subdued and quiet, more than was normally the case. Cowan returned to the motel at the end of the evening. The following morning, Cowan's suspicions of defendant's involvement in the woman's death caused him to call Silent Witness, an evidence gathering arm of the Phoenix Police Department. The police came to question Cowan, who surrendered his shoes and deodorant stick to them for testing the red spots. The soles of Cowan's shoes matched prints found near the victim's body in the alley. Additionally, preliminary testing found the red spots on the shoes to be consistent with the victim's blood. Based on these facts, police obtained a search warrant for the defendant's residence and van and took him into custody.

¶ 12 Police detectives questioned defendant after giving him the *Miranda* [FN1] warning. He initially denied involvement in the murder. When questioned about the blood on Cowan's shoes, defendant told detectives that he walked outside early that morning and saw the body. He said he looked at the body and touched and moved it to see if any marks were on the victim's back. Defendant denied killing Iler and attributed the blood on his shoes to the morning contact with her body. He stated that he did not tell anyone about the body because he did not want to be blamed for the death. Defendant admitted removing and taking a ring and other items from the body.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 13 A detective explained to the defendant that the police have equipment to detect traces of blood in a van that has been cleaned and on clothing that has been washed. At that point, defendant ceased his denials and stated that he wanted to confess the truth. He told the detective that he offered Iler a ride and she accepted. They stopped at a park near his residence where she agreed to have sexual intercourse in exchange for twenty dollars. He used a condom and attempted intercourse, but was unable to perform. He stopped trying and asked her to return his money.

¶ 14 Defendant claimed that Iler then became upset and pulled a knife. They struggled. He hit her in the chest four or five times and in the head three or four times, then slit her throat with a knife. After the killing, he amputated parts of her breasts, dumped the body in the alley, and placed her clothing in a nearby garbage container; he then returned to his residence and cleaned the van. Defendant admitted mutilating **1143 *372 Iler's breasts after she was dead. He said he did it because he was angry. He first claimed to have thrown the excised breast parts into the garbage container, but later confessed to flushing them through the toilet in his residence. After confessing the Iler murder, defendant also confessed to having committed the earlier murder of Teresa Humphreys.

¶ 15 Police searched defendant's residence and van and located a Swiss Army knife, keys, a blood-stained rope, and a "fanny pack" purse that belonged to Iler. Police also obtained from a nearby garbage container, identified by the defendant, bedding, a T-shirt, a sock, and a condom.

¶ 16 Prior to trial, the State moved *in limine*, pursuant to Rule 404(b), Arizona Rules of Evidence, to admit portions of defendant's confession, including parts relating to Humphreys' killing. The trial court denied the motion, ruling that evidence pertaining to Humphreys' murder was inadmissible. Consequently, the State determined not to use any of defendant's confession in its case-in-chief, indicating during a bench conference that no part of the confession would be offered because the prosecution did not wish "to open the door" to some exculpatory statements.

¶ 17 Defense counsel filed a trial memorandum requesting that the court rule defendant's entire confession admissible as hearsay exceptions under Rules 803(3) and 804(b)(3), Arizona Rules of Evidence. The State objected. The trial court sustained the State's objection and excluded the confession.

DISCUSSION

I. TRIAL ISSUES

A. ADMISSIBILITY OF DEFENDANT'S CONFESSION

III ¶ 18 We review the trial judge's refusal to admit defendant's confession for abuse of discretion. *State v. Lavers*

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Walters, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987). Decisions to exclude such evidence remain within the sound discretion of the trial court and will be reversed on appeal only upon a showing of clear, prejudicial abuse. State v. Ivala, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App.1994). "The prejudice must be sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." Id.

¶ 19 The statement, offered by the defendant to exculpate, was an out- of-court declaration and was thus inadmissible hearsay unless it fits within a recognized exception to the rule. Ariz.R.Evid. 804(c). This court has previously noted that the trustworthiness of a defendant's self-serving out-of- court statement was "highly suspect." State v. Smith (Robert), 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983). Defendant advanced two possible hearsay exceptions which we address in turn.

1. RULE 804-Statement Against Interest

¶ 20 Rule 804(b)(3) reads:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(3) *Statement against interest*.... A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. (Emphasis added.)

[2][3] ¶ 21 The rule sets forth three requirements for admissibility: (1) the declarant must be unavailable; (2) the statement must be against the declarant's interest; and (3) there must be corroborating evidence that indicates the statement's trustworthiness. All three must be satisfied. State v. Henry, 176 Ariz. 569, 575, 863 P.2d 861, 867 (1993); *see also* LaGrand, 153 Ariz. at 27, 734 P.2d at 569. [FN2] If a non-defendant declarant asserts **1144 *373 the Fifth Amendment privilege against self- incrimination, he is deemed unavailable as a witness. *See* State v. Lopez, 159 Ariz. 52, 54, 764 P.2d 1111, 1113 (1988) (defendant successfully sought admission of roommate's statements pursuant to Rule 804(b)(3) after roommate asserted Fifth Amendment privilege).

FN2. The State correctly asserts that the "*LaGrand* test" should apply only to cases in which someone other than the defendant is the declarant because a defendant's "self-serving" statements are always "highly suspect." The express wording of the rule is consistent with this argument since it refers with particularity to any statement which tends to "expose the declarant" and at the same time "exculpate[s] the accused...." Under this wording, the declarant must be one person and the accused another. Where the declarant and the accused are one and the same, the admissibility requirements of Rule 804(b)(3) are not met.

[4] ¶ 22 Here, the defendant *is* the declarant seeking admission of his own statements to police without taking the stand to testify. The State contends the defendant cannot refuse to testify and yet offer his own hearsay statements for the record. "When offered by the defendant, his out-of-court declarations are not subject to cross-examination by the prosecution. Therefore, such statements are appropriately inadmissible unless offered, not to prove the truth of their content," but for some other admissible purpose. King v. Commonwealth, 18 Va.App. 57, 441 S.E.2d 704, 705 (1994) (finding reliability of out-of-court statement as "the principal rationale underlying the hearsay rule").

[5] ¶ 23 "Unavailability" means that the party seeking admission of the statement cannot compel the declarant to testify. Defendant is not "unavailable" to himself and has the ability and the right to testify. Should he decline by asserting his Fifth Amendment privilege, he may not then seek to introduce his statement to police yet at the same time avoid cross-examination under oath and impeachment. The trial court correctly ruled that when a defendant proffers his own confession for exculpatory purposes, the statement constitutes inadmissible hearsay not in compliance with Rule 804(b)(3).

2. RULE 803-State of Mind

[6] ¶ 24 For a hearsay statement to be admissible under the Rule 803(3) exception, it must be "[a] statement of the

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declarant's *then existing* state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Ariz. R. Evid. 803(3) (emphasis added). Defendant's statement to police two days *after* the crime, that he felt threatened by the victim, fails to qualify as present "state of mind" under this hearsay exception because the statement described a *prior* mental state, not a present mindset. *State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App.1990) (emphasis added).

¶ 25 In *State v. Fulminante*, this court held that "the statement must describe declarant's present feeling or future intention rather than look backward, describing declarant's past memory or belief about another's conduct." *Id.*, 193 Ariz. 485, 495, 975 P.2d 75, 85 ¶ 32 (1999). The statement must be directed solely at the declarant's present state of mind, rather than constitute a narrative of prior factual events that created an earlier state of mind. *Id.*

¶ 26 Defendant's statements that he and the victim disrobed in the back of the van, that he became angry when he could not perform sexually and the victim refused to return the money, that she pulled a knife and defendant took it from her, and that he excised breast parts because of his anger described neither present feeling nor future intent. The statements contain nothing more than asserted memory of past events and fail to meet the requirements of Rule 803(3). The trial court did not abuse its discretion in excluding the confession as inadmissible hearsay pursuant to Arizona Rule of Evidence 801(c).

B. REFUSAL TO GRANT THE MANSLAUGHTER INSTRUCTION

17] ¶ 27 Defendant claims the jury should have been instructed on the lesser-included offense of manslaughter. The court must instruct the jury on every lesser-included offense to the offense charged, provided that the evidence supports the instruction. *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990). The trial court in *Amaya-Ruiz* instructed the jury, as here, on first and second degree murder but, in the absence of supporting evidence, refused to give the requested manslaughter instruction. We **1145 *374 held that when the court gives the jury proper first and second degree murder instructions, but refuses manslaughter, and the defendant is convicted of first degree rather than second degree murder, any error is harmless. *Id.* The jury, by implication, has rejected all lesser-included crimes. *See id.* (citing *State v. Ortiz*, 158 Ariz. 528, 764 P.2d 13 (1988)); *see also State v. Tickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989) (any error in failing to give manslaughter instruction cured by first degree murder conviction while rejecting second degree); *State v. White*, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985) ("[F]inding defendant guilty of the highest offense, to the exclusion of the immediately lesser- included offense, second degree murder, the jury necessarily rejected all other lesser-included offenses."). In the instant case, any error was harmless.

II. SENTENCING ISSUES

18][19] ¶ 28 In determining the appropriateness of a death sentence, we independently review the aggravation and mitigation findings of the trial court. A.R.S. § 13-703.01(A) (2001); *see, e.g.*, *State v. Kayer*, 194 Ariz. 423, 432-33, 984 P.2d 31, 40-41 ¶ 28 (1999). Independent review by this court ensures that the death penalty is not imposed arbitrarily, is reserved for exceptional cases which satisfy statutory aggravation standards, and is the appropriate sanction for the crime in question. *State v. Bible*, 175 Ariz. 549, 606, 858 P.2d 1152, 1209 (1993). The court reviews the record to determine the presence or absence of aggravating and mitigating circumstances, as well as the weight to be accorded each circumstance. *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) (presence or absence of factors); *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (weight given to factors).

110][111] ¶ 29 Aggravating circumstances must be proven beyond a reasonable doubt. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 28 (citing *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797 (1992)). Both statutory and non-statutory mitigating circumstances may be proven by a preponderance of the evidence. *State v. Djerf*, 191 Ariz. 583, 595, 959 P.2d 1274, 1286 ¶ 39 (1998) (citing *Brewer*, 170 Ariz. at 504, 826 P.2d at 801). When mitigation evidence is conflicting and entails considerations of credibility, we accord deference to the trial court's conclusions. *State v. Hoskins*, 199 Ariz. 127, 149, 14 P.3d 997, 1019 ¶ 97 (2000) (citing *State v. Valike*, 177 Ariz. 118, 128, 865 P.2d 779, 789 (1993)). But we are independently responsible for weighing all factors to determine ultimately whether proven mitigating circumstances, measured separately or cumulatively, are sufficient to outweigh aggravating circumstances established on the record. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 28.

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[12] ¶ 30 The rules of evidence governing admissibility differ as between aggravating and mitigating circumstances. "[I]nformation relevant to any mitigating circumstances ... may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials...." A.R.S. § 13-703(C) (2001). However, "the admissibility of information relevant to any ... aggravating circumstance ... shall be governed by the rules of evidence." *Id.*

A. AGGRAVATING FACTORS

[13] ¶ 31 A court cannot impose the death penalty unless it finds that the State has proved at least one aggravating factor under A.R.S. § 13-703(F). *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). At trial, the State advanced two: (1) previous conviction of a serious crime, A.R.S. § 13-703(F)(2); and (2) the murder was especially heinous, cruel, or depraved, A.R.S. § 13-703(F)(6). The trial court found each factor beyond a reasonable doubt.

1. A.R.S. § 13-703(F)(2): Previous Conviction of a Serious Offense

[14][15] ¶ 32 The legislature amended the (F)(2) aggravating factor, effective April 1993. The date of the crime for which the death sentence was given is the date used to evaluate whether the new version applies. Because the Iler murder occurred in September 1993, the amended version of (F)(2) is applicable. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 30; **1146*375 *State v. Rienhardt*, 190 Ariz. 579, 589, 951 P.2d 454, 464 (1997). Amended § 13-703(F)(2) reads: Aggravation is established where "[t]he defendant was previously convicted of a serious offense, whether preparatory or completed." Second degree murder is a "serious offense." A.R.S. § 13-703(H)(1)(b) (2001).

¶ 33 Defendant was convicted of second degree murder in the killing of Teresa Humphreys. The conviction qualifies under the statute as a previous conviction of a serious offense. The State established at sentencing that the defendant committed second degree murder, and the defendant does not challenge this finding. We therefore hold the (F)(2) aggravating circumstance was established beyond a reasonable doubt.

2. A.R.S. § 13-703(F)(6): Especially Heinous, Cruel or Depraved

[16] ¶ 34 Section 13-703(F)(6) reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner." To find that a murder fits within this provision, the State must prove that the crime was committed in a manner that places it above the norm for first degree murder. *State v. Gretzler*, 135 Ariz. 42, 53, 659 P.2d 1, 12 (1983). Because the statute is worded in the disjunctive, any one of three elements--heinousness, cruelty, or depravity--is independently sufficient. *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 ¶ 33 (1999).

¶ 35 The State alleged that all three elements of (F)(6) had been established. The trial court did not find especial cruelty because of the absence of defensive wounds or other evidence of consciousness of the victim.

[17] ¶ 36 Unlike cruelty, which focuses on the victim's mental suffering and physical pain, heinousness and depravity pertain to the killer's state of mind during and immediately following the murder, as evidenced by his words or conduct. *Medina*, 193 Ariz. at 513, 975 P.2d at 103 ¶ 35. This court has previously defined depraved as "marked by debasement, corruption, perversion or deterioration," and heinous as "hatefully or shockingly evil; grossly bad." *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10 (citing *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977)).

a. Gratuitous Violence

[18] ¶ 37 The trial court concluded both heinousness and depravity were proven beyond a reasonable doubt by evidence of defendant's gratuitous violence. We agree. Maiming a victim beyond the point necessary to fulfill a defendant's criminal purpose, *see* *State v. Ceja*, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980), or beyond the point necessary to kill, constitutes gratuitous violence. *Rienhardt*, 190 Ariz. at 590, 951 P.2d at 465. Accordingly, this court has held that bruises to a victim's legs and arms, scraping and cutting injuries to the neck, chest, and breast, a head wound, strangulation, and two deep slashes to the throat demonstrate a defendant's "attempt to inflict unnecessary and gratuitous violence beyond that required to kill" the victim. *State v. Walden*, 183 Ariz. 595, 619, 905 P.2d 974, 998 (1995).

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[19] ¶ 38 Here, the cause of death was a single, deep knife slash to the victim's throat. Yet, forensic evidence established that defendant also struck the victim on the head several times and delivered enough blows to her chest to fracture the sternum. In addition, petechial hemorrhages in the victim's eyes and a ligature mark around her neck demonstrated an attempt at strangulation prior to her death. Defendant contends that because these injuries occurred prior to death, they evince nothing more than a struggle between the victim and defendant and demonstrate that all such injuries were necessary to kill. This claim, however, is at odds with the physical evidence.

¶ 39 Forensic evidence established that these were not defensive wounds and that a struggle, as claimed by the defendant, was not likely to have occurred. Whether his objective was merely to retrieve money previously paid or actually to take the victim's life, the violence to her body far exceeded that necessary to accomplish either goal. Gratuitous violence was established beyond a reasonable doubt. This finding alone is sufficient to constitute the (F)(6) aggravating circumstance.

b. Mutilation

[20][21] ¶ 40 Mutilation, also a form of heinousness and depravity, "is an act distinct ****1147 *376** from the killing itself that includes the purposeful severing of body parts." *State v. Doerr*, 193 Ariz. 56, 68, 969 P.2d 1168, 1180 ¶ 55 (1998). A finding of mutilation requires some demonstration that the defendant acted with a "separate purpose to mutilate the corpse." *State v. Richmond (III)*, 180 Ariz. 573, 580, 886 P.2d 1329, 1336 (1994). In *Doerr*, this court held that defendant's amputation of part of the victim's left breast and the attempted removal of parts of the right breast established mutilation. 193 Ariz. at 68, 969 P.2d at 1180 ¶ 55.

[22] ¶ 41 The defendant here admittedly excised parts of both breasts *after* the death. This constitutes body mutilation. Because he claims these actions were done in anger, the defendant himself separated his motivation to kill from his motivation to mutilate. The evidence is sufficient to prove the (F)(6) factor beyond a reasonable doubt. Moreover, the defendant concedes in the opening brief that his acts of mutilation establish the (F)(6) factor.

B. MITIGATING FACTORS

¶ 42 The mitigation statute reads in pertinent part:

> The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
>
> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

A.R.S. § 13-703(G)(1) (2001).

[23][24][25] ¶ 43 We assess both statutory and non-statutory mitigating factors. The former includes significant mental impairment, urged by the defendant. The latter, also urged by the defendant, includes any facet of defendant's character, propensities or record, and any other circumstances of the offense. The purpose of mitigation evidence is to permit the court to determine whether a sentence less severe than death is appropriate. *See* *State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995); *State v. Gonzales*, 181 Ariz. 502, 514, 892 P.2d 838, 850 (1995); *State v. Wood*, 180 Ariz. 53, 70, 881 P.2d 1158, 1175 (1994). If evidence of mitigation fails to meet the relevant statutory standard, the court must then consider whether it may constitute non-statutory mitigation. *State v. Gallegos (I)*, 178 Ariz. 1, 22, 870 P.2d 1097, 1118 (1994). Although the court must consider all relevant evidence offered in mitigation, not all proffered evidence must be found by the court to be mitigating, and even if mitigating, such evidence may deserve no more than slight or nominal weight. *State v. Murray*, 184 Ariz. 9, 38, 906 P.2d 542, 571 (1995); *Gonzales*, 181 Ariz. at 515, 892 P.2d at 851 (court required to do no more than consider all evidence offered in mitigation).

[26] ¶ 44 The existence of mitigating circumstances is subject to a preponderance of the evidence standard. *State v. Dickens*, 187 Ariz. 1, 24, 926 P.2d 468, 491 (1996); *State v. Laird*, 186 Ariz. 203, 207-08, 920 P.2d 769, 773-74 (1996). The court has discretion to determine how much weight, if any, to give each factor. *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996); *State v. Jones*, 185 Ariz. 471, 489, 917 P.2d 200, 218 (1996).

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¶ 45 At sentencing, the trial court concluded that defendant's mitigation evidence failed to outweigh the two aggravating factors associated with Iler's murder. Such evidence was thus not sufficiently substantial to call for leniency, and defendant challenges these findings.

1. STATUTORY MITIGATION

a. Significant Impairment--A.R.S. § 13-703(G)(1)

[27] ¶ 46 To qualify for a finding of (G)(1) significant impairment, a defendant must demonstrate that his "capacity to appreciate the wrongfulness of his conduct *or* to conform his conduct to the requirements of law was significantly impaired." *Kayer*, 194 Ariz. at 437, 984 P.2d at 45 ¶ 48 (quoting ****1148 *377** A.R.S. § 13-703(G)(1) (emphasis added)). Because this factor is phrased disjunctively, proof of incapacity as to either component will establish mitigation. *Murray*, 184 Ariz. at 40-41, 906 P.2d at 573-74.

[28] ¶ 47 A diagnosed mental illness may establish the (G)(1) factor. *See Kayer*, 194 Ariz. at 437, 984 P.2d at 45 ¶ 49.

[29][30] ¶ 48 In determining the existence of (G)(1) mitigation, the trial judge has broad discretion in evaluating the weight and credibility of expert mental health evidence. *Doerr*, 193 Ariz. at 69, 969 P.2d at 1181 ¶ 64; *State v. McKinney (II)*, 185 Ariz. 567, 579, 917 P.2d 1214, 1226 (1996). When mitigation evidence conflicts and entails considerations of credibility, we give substantial deference to the trial court's determinations. *See Hoskins*, 199 Ariz. at 149, 14 P.3d at 1019 ¶ 97 (citing *Milke* at 128, 865 P.2d at 789).

[31] ¶ 49 The trial court heard testimony from psychiatric experts for the defendant and the State, as well as from mitigation investigators Mary Duran and Nora Shaw. Defendant's expert, Donald F. Stonefeld, M.D., diagnosed the defendant as suffering from paranoid schizophrenia both prior to and at the time of the killing. He testified that the defendant also suffered from post traumatic stress disorder (PTSD). According to Stonefeld, defendant's Minnesota Multiphasic Personality Inventory (MMPI) test results suggested serious psychopathology with a possible indication of psychotic symptoms and behavior.

¶ 50 Defendant's family has a history of mental health problems. Moreover, he may have had disordered thought processes in early childhood and suffered from lack of judgment and perspective. Stonefeld testified that defendant's mental illness precludes him from normal perceptions of reality. Additionally, at the time of the killing, defendant had used drugs and alcohol that exacerbated his mental deficiency. His drug use began at age eight.

¶ 51 Stonefeld opined that defendant's home environment caused confusion as to his sexuality and sexual identity because his mother frequently switched sexual partners and preferences. Defendant's sexual identity was further confused by several occasions of sexual abuse, both by men and women during childhood. Defendant's history of sexual abuse was corroborated by his brother. Defendant's mother also suffered depression and low self-esteem and exhibited self-absorbed and neglectful behavior patterns toward defendant and his siblings. Defendant claims to have hallucinated during the killing and maintains that his enraged conduct resulted from the fear of either sexual inability or possible homosexuality.

¶ 52 Defendant was first sexually abused between the ages of four and five. At nine or ten years, he was sodomized. Two occasions of sexual molestation during his childhood were perpetrated by adult women. Again at age fifteen, defendant was sodomized several times. All incidents of sexual abuse were perpetrated by strangers or acquaintances, not by family members. By the age of sixteen, defendant supported himself financially by "hustling" on the streets.

¶ 53 Defendant's father was absent and his mother was neglectful, which generated a pattern of thinking by defendant that he could act without consequence. He acted in an unruly manner as a young child and was placed on Ritalin between the ages of five and six for behavioral problems, but he received no further treatment for these difficulties. He attempted suicide several times, including once at age ten. Defendant was placed in special education classes due to his mental health and disabilities.

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¶ 54 Stonefeld further opined that the circumstances of the killing demonstrated a lack of control. Defendant perceived his victim as a threat in this sexual situation and, because of his paranoia, believed he was in danger.

¶ 55 Based on this evidence, Stonefeld concluded that defendant's paranoid schizophrenia would have substantially impaired his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. Stonefeld further concluded that symptoms of the impairment had been apparent since childhood.

¶ 56 The trial court also heard testimony from the State's psychological expert, Michael *378 **1149 Brad Bayless, Ph.D., who contradicted Stonefeld's diagnosis and opinions. Bayless opined that "Pandeli was fully aware of his behavior at the time of the offense. He was able to appreciate the wrongfulness of his conduct, and clearly understood the nature and quality of his act." Bayless based this opinion on proof that defendant initially denied involvement in the crime and attempted to eliminate evidence by cleaning his van, washing clothing, and discarding items because he understood the wrongfulness of his actions.

¶ 57 Bayless rejected the diagnosis of paranoid schizophrenia because he disagreed with Stonefeld's interpretation of defendant's MMPI and because, in his opinion, defendant did not meet all of the applicable criteria listed in The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (4th ed.1994), the "bible" of psychological diagnosis. According to Bayless, paranoid schizophrenia is fully incompatible with someone like Pandeli who maintains an active social life and exhibits the ability to interact and make eye contact with others.

¶ 58 Bayless further rejected Stonefeld's diagnosis of PTSD, citing the absence of sufficient indicia. He testified that PTSD is not an "on and off" phenomenon but rather a condition which would grow more prominent if untreated. Bayless testified that he observed no evidence of the disorder. Instead, Bayless indicated that defendant exhibited certain traits of narcissistic and anti-social personality disorder, but Bayless stopped short of diagnosing anti-social personality disorder because defendant failed to exhibit all the appropriate criteria.

¶ 59 The trial court evaluated the competing mental health evidence, as well as all other (G)(1) evidence presented, including the facts of the crime and the defendant's confession. The court stated in its Special Verdict:

> Dr. Bayless, without hesitation and unequivocally, dismissed Dr. Stonefeld's opinion. He said that the Defendant was not a paranoid schizophrenic nor was he suffering from post traumatic stress disorder. In Dr. Bayless' view this Defendant exhibits many of the traits of a person who suffers from an antisocial personality disorder--but nothing more.

Special Verdict at 4. Ultimately, the court determined by a preponderance of the evidence that the mental illnesses or disorders, testified to by Stonefeld, did not exist. Additionally, the trial court relied on defendant's attempt to cover up the killing, and his demeanor before and after the crime, in finding that he clearly appreciated the wrongfulness of his conduct.

¶ 60 The trial court's function is to assess the credibility of the expert testimony. *See* Doerr, 193 Ariz. at 69, 969 P.2d at 1181 ¶ 64. The court's conclusion that defendant does not suffer from a mental illness, but at most, a personality disorder, requires significant deference from this court. *See* Milke, 177 Ariz. at 128, 865 P.2d at 789. This court has previously held that a defendant's conduct before and after the crime--such as lying about the crime, retrieving belongings before fleeing, and participating in conduct as to avoid capture and prosecution--will support a finding that the defendant was not impaired at the time of the offense. *See* Jones, 185 Ariz. at 489, 917 P.2d at 218. Upon reviewing the medical and other evidence, we conclude the defendant failed to establish the (G)(1) statutory mitigator.

2. NON STATUTORY MITIGATION

a. Family and Developmental History, Mental/Emotional Health

[32][33] ¶ 61 Following the decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this court acknowledged that "even if a disorder does not rise to the level of mental disease or defect originally contemplated in (G)(1), the inquiry is not over." State v. Trostle, 191 Ariz. 4, 20, 951 P.2d 869, 885 (1997). The court will continue to assess the evidence to determine whether non-statutory mitigation may be sufficient to warrant a reduction in sentence. Id. (citing State v. McMurtrey, 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983)). In addition, the court will

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determine whether the required causal nexus exists between any mental or personality disorder and the defendant's *379 **1150 criminal acts. Hoskins, 199 Ariz. at 152, 14 P.3d at 1022 ¶ 111. Our primary task when assessing evidence of mental disorder is to determine its mitigating weight. Trostle, 191 Ariz. at 20-21, 951 P.2d at 885-86.

¶ 62 The trial court reconsidered (G)(1) mitigation evidence for non-statutory mitigation and found that though defendant's proven developmental history, family background, and mental and emotional condition might otherwise constitute non-statutory mitigation, such circumstances merited no weight because causation was not established. There was no link between the dysfunction in defendant's life and his crime:

> The Court now determines that the Defendant has proven by a preponderance of the evidence that his family background, his overall developmental history and his mental and/or emotional health through the years to the present as found and described by the Court immediately above are non-statutory mitigating circumstances, though these circumstances are not near [sic] as compelling as represented and argued by the Defendant. Without a doubt, this Defendant had tough and formidable challenges to contend with in his childhood and adolescent years. *In the end, however, when the Court considers these factors separately and collectively, it is unable to make the link from them to the unspeakable criminal conduct in this murder* and they are, therefore, weighed accordingly with any other non-statutory mitigating circumstances against the aggravating circumstances proven beyond a reasonable doubt and already found to exist.
>
> Special Verdict at 7 (emphasis added).

[34] ¶ 63 A nexus is established by evidence, testimonial or otherwise, connecting defendant's mental or personality disorder with his crime. *See* Trostle, 191 Ariz. at 19-20, 951 P.2d at 884-85 (psychiatric testimony that "defendant's traumatic upbringing and resulting mental disturbance influenced his criminal actions"). In Hoskins, we stated that a nexus finding requires credible expert testimony based on reasoned medical and psychological analysis, that as between the mental disorder or dysfunctional family history and the actual crime, the former must be a cause of the latter. 199 Ariz. 127, 152 n. 8, 14 P.3d 997, 1022 n. 8.

[35] ¶ 64 Here, defendant proffered evidence of several instances of sexual abuse perpetrated by both adult women and men, a neglectful mother, and personality disorders, all of which were accepted as evidence of mitigation by the trial court. Additionally, defendant produced evidence that his own sexual history and identity were wrought with violence and confusion. The trial court accepted this evidence within the umbrella of family and developmental history and mental condition evidence.

¶ 65 Stonefeld opined that defendant's mental disorders affected his actions on the night of the murder. However, Bayless countered both Stonefeld's diagnosis and opinion of causal link, stating unequivocally that the defendant was neither experiencing paranoid delusions, nor was schizophrenia or any other mental disorder a factor which caused this crime to occur. Defendant was in control of his actions and fully understood what he was doing. The trial court accepted Bayless as the more credible expert and concluded that the required nexus, clearly and simply, did not exist between defendant's personality disorder and the crime.

¶ 66 We hold on this record that the defendant failed under the preponderance standard to prove the existence of a causal nexus and, consequently, failed to establish this non-statutory mitigator.

b. Residual Doubt

[36] ¶ 67 Defendant contends residual doubt exists as to the jury's finding of premeditation and that the trial court erred in refusing to invoke residual doubt as a mitigating factor. We have previously explained our approach to this issue, holding that when a jury verdict "finding defendant guilty beyond a reasonable doubt is supported by very strong evidence, the trial court properly refused to find the nonstatutory mitigating circumstance of residual doubt." State v. Spears, 184 Ariz. 277, 295, 908 P.2d 1062, 1080 (1996), *cert. denied*, 519 U.S. 967, 117 S.Ct. 393, 136 L.Ed.2d 308 (2000). The same **1151 *380 is true, even where the verdict is grounded in circumstantial evidence. *See* State v. Atwood, 171 Ariz. 576, 653, 832 P.2d 593, 670 (1992).

[37] ¶ 68 Here, relying on his confession, which was properly admitted for sentencing purposes, defendant argues that the victim enraged him by pulling a knife and struggling with him and that he reacted by killing her. Evidence

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introduced at trial does not support this argument. No forensic evidence reflected a struggle between victim and defendant. No evidence except defendant's confession demonstrated enragement. The victim was beaten and strangled before the killing, affording defendant an opportunity to consider what he was doing. Moreover, this was a repeat crime. Defendant had previously killed another female, also by slitting her throat. His exculpatory claims were not credible, and substantial evidence enabled the jury to find premeditation beyond a reasonable doubt.

¶ 69 We have not heretofore invoked residual doubt as a mitigating circumstance. See State v. Harrod, 26 P.3d 492 (2001). Even were we to do so, this record has no evidentiary basis for residual doubt.

c. Rehabilitation

[38][39] ¶ 70 The potential for rehabilitation during a life sentence may constitute a mitigating circumstance. *See* State v. Ross, 154 Ariz. 245, 249, 741 P.2d 1223, 1227 (1987). This court has held that the "ability to function well in a structured environment" may constitute mitigation. Jeffers, 191 Ariz. at 22, 951 P.2d at 887.

¶ 71 Here, the defendant has lived in custody for several years without incident, his MMPI results indicate controlled environments are positive for him, his personality disorders are treatable, he has expressed remorse, he has acquired religious faith, and he has educated himself by learning to read in prison. Indeed, the trial court found that defendant's good behavior as a prisoner, as well as his efforts to learn to read and become a minister, constituted non-statutory mitigation.

¶ 72 His incarceration, however, has been spent in administrative segregation, where he has had fewer opportunities to interact with others. We find that defendant's potential for permanent rehabilitation, even where mitigating, can be accorded only the slightest weight, insufficient, even in concert with other mitigation evidence, to bring about a changed result.

d. Defendant has Adapted to Incarceration

[40][41] ¶ 73 Good conduct during pretrial and presentence incarceration may be, but is not always, mitigating. *See* Spreitz, 184 Ariz. at 294, 908 P.2d at 1079; State v. Stokley, 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995). Defendant presented evidence at the sentencing hearing that he has been a model prisoner. He has not been involved in difficulties or altercations while in prison and has adjusted to his incarceration. This evidence was found to be minimally mitigating. We agree.

e. Educational Advancements Since Incarceration

[42] ¶ 74 Evidence of educational achievement has been considered nominally mitigating. *See* State v. Hensley, 141 Ariz. 598, 604, 691 P.2d 689, 695 (1984). Uncontradicted evidence at the sentencing hearing established that defendant taught himself to read and write while incarcerated. These advancements are entitled only to minimal mitigation.

f. Poor Health

[43] ¶ 75 We have held that a defendant's post-incarceration illness is not relevant to the question of leniency. State v. Spreitz, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993). The defendant offered mitigating evidence that he contracted hepatitis C, which will shorten his life, and the trial court found that defendant established this fact by a preponderance of the evidence. However, it found the illness to be minimally mitigating. We disagree. The evidence is not mitigating.

****1152 *381** g. Timing of Prior Murder and Circumstances of Present Offense

[44] ¶ 76 Defendant claims that the timing of the Humphreys killing and the circumstances of the present killing should be considered mitigating. However, little argument is presented on the "timing" factor, and the argument, such as it is, is unclear. We assume defendant is referring to the fact the Humphreys murder occurred more than a year

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earlier. We accord this fact no weight in mitigation.

h. Cooperation with Law Enforcement Personnel

[45][46] ¶ 77 Admission of guilt and cooperation with the police can be a mitigating circumstance. State v. Moore, 186 Ariz. 314, 326, 921 P.2d 1151, 1163 (1996). Defendant requests that his cooperation with the police and his confession be considered mitigating. However, defendant did not cooperate with police, evidenced by the fact that he sought to hide or destroy evidence, evade detection, and initially denied knowledge of the crime. Only when he believed his guilt was discoverable through forensic testing did he attempt to help himself by confessing. This form of cooperation will not serve as mitigation.

i. Genuine Remorse

[47][48] ¶ 78 Genuine remorse may constitute non-statutory mitigation. State v. Gallegos, II, 185 Ariz. 340, 345-46, 916 P.2d 1056, 1061-62 (1996) (defendant eventually cooperated with police and expressed remorse at the sentencing hearing); Atwood, 171 Ariz. at 653, 832 P.2d at 670. The defendant expressed remorse over the killings of both Humphreys and Iler and expressed regret over the pain brought upon their families. The trial court found defendant's remorse genuine and mitigating. His expressions of remorse during the confession and at sentencing appear authentic. We conclude defendant established remorse as a mitigator by a preponderance of the evidence.

j. Religious Faith

[49][50] ¶ 79 New-found religious faith may be considered non-statutory mitigation. *See* State v. Spreitz, 163 Ariz. 260, 269, 787 P.2d 1056, 1065 (1990) (defendant found religion in prison and ministered to other inmates); State v. Gallegos, II, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (becoming religious, showing remorse, and being a placid prisoner was mitigating). Defendant sought religious affiliation while incarcerated. We find this form of religious faith, found after conviction and incarceration, entitled only to slight mitigating weight.

k. Overall Good Prior Character

[51][52] ¶ 80 Evidence of no prior crimes may be mitigating. Stokley, 182 Ariz. at 523, 898 P.2d at 472 (lack of prior felony convictions may constitute non-statutory mitigation). Evidence of general good character may be mitigating. *See* State v. Williams, 183 Ariz. 368, 384, 904 P.2d 437, 453 (1995). Prior to the two murders, defendant had no trouble with the law. However, in light of the two murders committed just over one year apart, any argument of overall good character must be rejected.

C. WEIGHING CIRCUMSTANCES

[53] ¶ 81 Aggravating and mitigating circumstances are evaluated both separately and cumulatively. State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994). When at least one aggravator is found and one or more mitigators is established, this court must decide whether the mitigation is sufficiently substantial to call for a reduction in sentence. State v. Zaragoza, 135 Ariz. 63, 70, 659 P.2d 22, 29 (1983).

[54] ¶ 82 The trial court found A.R.S. §§ 13-703(F)(2) (prior conviction of serious crime) and (F)(6) (heinous, cruel or depraved) aggravation beyond a reasonable doubt and concluded that the mitigating circumstances, viewed separately or together, were insufficient to call for leniency. "This was a savagely cruel, coldblooded, and very brutal first degree murder that, when considered with the fact that the Defendant murdered the victim in Count I by also slitting her throat, warrants the severest sanction." Special Verdict at 9.

**1153 *382 ¶ 83 After thorough review, we conclude that all mitigating factors, viewed separately or cumulatively, fail to provide sufficient reason to call for leniency in light of the prior murder of Humphreys, as well as the brutal circumstances of the Iler murder and the subsequent mutilation of her body.

III. ISSUES RAISED TO PREVENT PRECLUSION

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¶ 84 Defendant makes additional arguments to prevent preclusion. None of the arguments will assist him. This court has previously considered and rejected each.

¶ 85 1. The Arizona death sentencing procedure is unconstitutional because it denies the right to trial by jury on all sentencing issues. *See* Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); ***but see*** State v. Ring, 200 Ariz. 267, 278-279, 25 P.3d 1139, 1150-1151, ¶¶ 40-44 (2001), regarding the issue raised under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and related cases.

¶ 86 2. Arizona's sentencing procedure requires proof of mitigating circumstances by a preponderance of the evidence, which improperly precludes the sentencing court from considering some mitigating evidence. White, 194 Ariz. at 355, 982 P.2d at 830 ¶ 49 (statutory requirement of proving mitigation by preponderance of the evidence does not obviate consideration of all mitigating facts).

¶ 87 3. The sentencing statute is facially invalid as irrational and as cruel and unusual punishment. State v. West, 176 Ariz. 432, 455, 862 P.2d 192, 215 (1993) (Arizona death statute not cruel and unusual on its face).

¶ 88 4. The sentencing statute violates defendant's right to individualized punishment by requiring imposition of death when one aggravating circumstance is found with no mitigating factors. *See* Bolton, 182 Ariz. at 310, 896 P.2d at 850.

¶ 89 5. The sentencing statute fails to provide defendant with an opportunity to death qualify the sentencing judge. *See* Gulbrandson, 184 Ariz. at 72, 906 P.2d at 605.

¶ 90 6. The sentencing statute fails to provide objective standards to guide the sentencing court in weighing aggravating and mitigating circumstances, places the burden of proof of mitigation impermissibly on the defendant, fails to channel the sentencing discretion of the court by failing to narrow the class of persons eligible for the death penalty, and fails to require the State to prove that a death sentence is appropriate. White, 194 Ariz. at 355, 982 P.2d at 830 ¶ 49.

¶ 91 7. The statute violates due process of law by not requiring a proportionality review. *See* State v. Salazar, 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992) (proportionality review not constitutionally required).

¶ 92 8. The statute fails to require the sentencing court to find beyond a reasonable doubt that aggravating circumstances outweigh the accumulated mitigating circumstances. Stokley, 182 Ariz. at 516, 898 P.2d at 465.

¶ 93 9. The statute fails to provide a procedure by which to evaluate the impartiality of the sentencing judge. White, 194 Ariz. at 356, 982 P.2d at 831 ¶ 49 (no provision necessary for voir dire examination of the sentencing court).

CONCLUSION

¶ 94 Defendant's conviction of first degree murder is founded on substantial evidence. The State proved two aggravating circumstances beyond a reasonable doubt: (F)(2), the defendant committed a prior serious offense, and (F)(6), this murder was especially heinous, cruel or depraved. Defendant failed to prove the existence of the (G)(1) statutory mitigating circumstance. Though defendant proved that his family and developmental history presented great difficulty and that he suffers mental and emotional difficulties, he failed to establish the requisite causal nexus between these circumstances and the Iler murder. He did establish that he has been a good prisoner, has made educational progress since incarceration, possesses genuine remorse, and has gained religious faith. We have considered and weighed all mitigating factors separately and cumulatively. That analysis leads us to conclude that the mitigation is insufficient to reduce the sentence. We therefore affirm both the conviction of **1154 *383 first degree murder and the capital sentence imposed by the trial court.

CONCURRING: THOMAS A. ZLAKET, Chief Justice, STANLEY G. FELDMAN, Justice FREDERICK J. MARTONE, Justice, RUTH V. McGREGOR, Justice.

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